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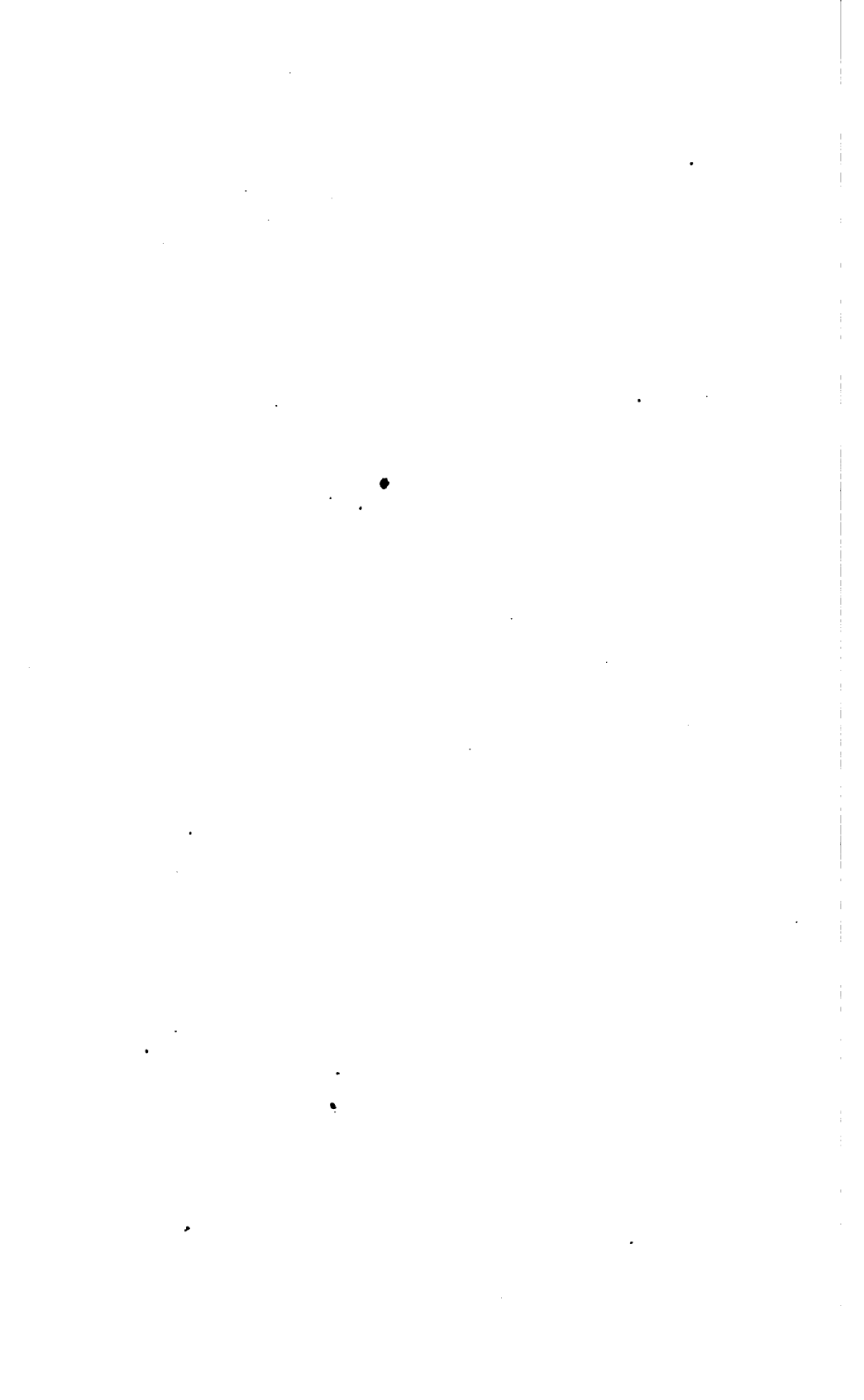
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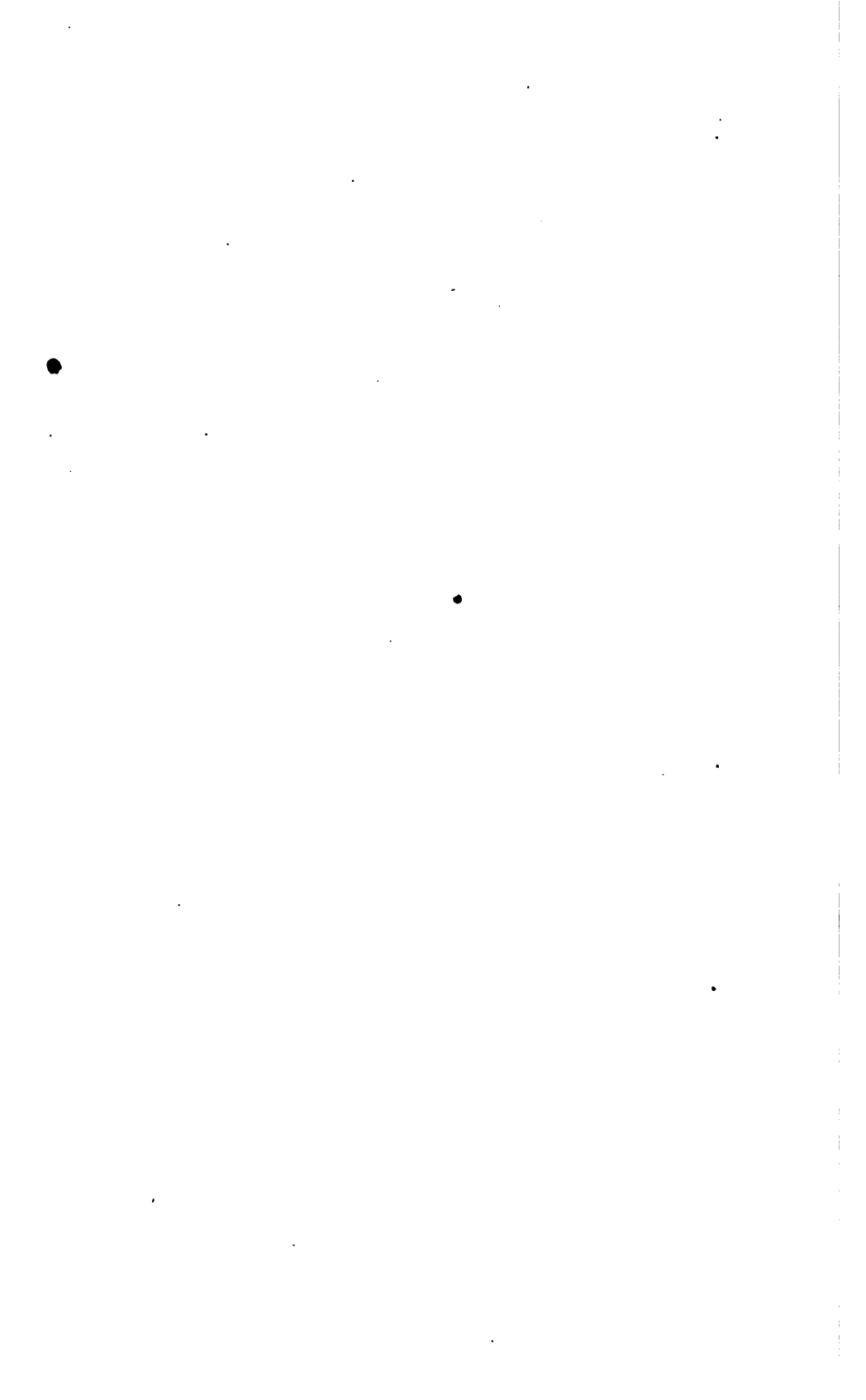
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Class









The Law of the Farm.

THE
LAW OF THE FARM;

A TREATISE

ON THE

LEADING TITLES OF THE LAW

INVOLVED IN

Farming Business and Litigation.



BY

A. W. THOMPSON,

Attorney and Counselor at Law.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1876.

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BY A. W. THOMPSON.

TO MY BRETHREN,

The Lawyers of the Agricultural Districts,

AND

The Patrons of Husbandry,

This volume is respectfully dedicated, with the hope that it may prove
convenient and useful to them all.

PREFACE.

The writer, for fifteen years, superintended his farm and also practiced law, having his office in a neighboring town. For something more than two years he has acted as the attorney of the several "Grange" corporations at San Francisco, and has been so situated as to become aware that there exists considerable demand for a book adapted to the wants of farmers, country lawyers, justices, and factors of country produce, giving, tersely, the law applicable to farming, and its kindred pursuits of dairying and stock-raising. This demand the author has attempted to meet by the preparation of this book, hoping that his lack of ability to do justice to the subject may be in some measure obviated by the amount of labor which he has put into the work, and by which he has, as he believes, been able to present all that appears in the statutes, reports, and text-books which belongs in a treatise under the distinctive title of "The Law of the Farm."

A. W. THOMPSON.

November, 1876.



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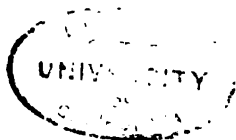
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LAWS FOR THE ENCOURAGEMENT OF AGRICULTURE.

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- § 2. The Department of Agriculture.
- § 3. Agricultural colleges.
- § 4. Expenses of agricultural colleges to be paid by the States.
- § 5. Special provisions by acts of Congress as to agricultural colleges.

§ 1. The value of agriculture to the body politic has been generally recognized, and, from an early date in the history of national and State legislation, the propriety of fostering it by special statutes admitted.

As early as 1817 an act was passed by Congress, offering rewards and granting privileges to a colony of French emigrants, skilled in the culture of vines and olive trees, to induce them to establish that branch of industry in the United States,¹ and from that time forward much attention has been given to this class of legislation, the result of which has been that laws for the encouragement of agriculture form a leading characteristic of the statutes of the nation and the several States.

§ 2. The department of agriculture, in the Government of the United States, was by act of Congress established at the national capital, May 15th, 1862, the duties for the performance of which the department was created, being to acquire, and diffuse among the people of the United States information upon subjects connected with agriculture, and to procure, propagate, and distribute to residents in the several States and Territories new and valuable seeds, plants, and trees.² A commissioner of agriculture is made the head of this department, and under him are employed skilled botanists, gardeners, entomologists, and other persons learned in the natural sciences, and by their co-

¹ U. S. Stats. at Large, Vol. 3, p. 374.

² Ibid, Vol. 12, p. 387.

operation the commissioner collates all available information, by statistics, experiments, and culture, and also collects new and valuable seeds, plants, and trees, for gratuitous distribution to such persons as, by culture and experimental farming, will demonstrate their value, and where found to be desirable acquisitions to the agricultural or pomological wealth of our country, will economise seed, cuttings, or grafts, so as to bring the several plants or trees into general culture. The results of these labors, the information obtained, is given to Congress by annual reports; and specimens of the seeds, plants, and trees, obtained or raised, are sent to residents in the various States who are engaged in pursuits of such a character as to be interested in the improvement of agricultural and pomological products.

The public appreciation of the importance of the labors intrusted to and the value of results obtained by this department has been such that liberal annual appropriations of money have been made for its support, and this branch of the General Government has become very efficient and of great public utility.¹

§ 3. Agricultural colleges.—Special provision for the establishment and maintenance of colleges, in which agriculture and the mechanic arts are to be taught, was made by act of Congress, approved July 2d, 1862, by the terms of which is allotted to each State a quantity of the public domain, not mineral, equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of 1860;² and where it occurs that within any State the nation has not the requisite lands to meet this allotment, the Secretary of the Interior issues, to such State, land scrip to the amount in acres of its share of the public domain under the provisions of the act. No State can locate any of this scrip, but the assignees of the State may do so upon any of the unappropriated lands of the United States which are subject to sale at one dollar and a quarter an acre.³ Not more than one million acres can be located by such

¹ March 30th, 1867, \$50,000 was appropriated to this department for the sole purpose of providing for the purchase of seeds for distribution in the Southern States. (U. S. Stats. at Large, Vol. 15, p. 28.)

² U. S. Stats. at Large, Vol. 12, p. 503, Sec. 2.

³ Ibid, Sec. 2.

assignees in any one of the States,¹ and no such locations could be made within one year from the date of the passage of the act.²

§ 4. All the expenses must be paid by the States, including all disbursements requisite to make the donation available for the purposes contemplated, such as those incident to the location of the land, the sale of it, or of the land scrip, the collecting, handling, and paying out of the money realized therefrom, so that the entire proceeds shall be applied, without diminution, to the purposes provided in the act.³

All moneys derived from the sale of the lands or scrip shall be invested in stock of the United States, or of the States, or some other safe stock yielding not less than five per cent. per annum upon the par value of the stocks, and the fund thus created and invested shall constitute a perpetual fund and remain forever undiminished,⁴ except that ten per cent. of the capital of the fund may be expended for the purchase of lands for sites of colleges or for experimental farms.⁵ The interest of the fund shall be inviolably appropriated by each State to the endowment, support, and maintenance of at least one college, where the leading object shall be, "without excluding other scientific and classical subjects, and including military tactics," to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may prescribe; and if any portion of this fund be lost, it shall be replaced by the State; no part of the fund shall be used in the purchase, erection, preservation, or repair of any building.⁶ "Each State shall provide, within five years, at least

¹ Ibid, Sec. 2. It appears that the State of Wisconsin violated the provisions of this section, as May 5th, 1870, Congress passed an act legalizing excessive issues and locations of this scrip by that State, and directing the Commissioner of the General Land Office to issue patents on them. (U. S. Stats. at Large, Vol. 16, p. 116.)

² Ibid, Sec. 2. But this provision was also violated, and July 1st, 1870, Congress legalized all locations of scrip made within thirty days after the approval of the said Act of July 2d, 1862, which in other respects were in accordance therewith. (U. S. Stats. at Large, Vol. 16, p. 186.)

³ U. S. Stats. at Large, Vol. 12, p. 503, Sec. 3.

⁴ Ibid, Sec. 4.

⁵ Ibid, Sec. 5.

⁶ Ibid, Secs. 4, 5.

one college, for the purposes above designated, or the grant to such State shall cease.¹ No State can receive the benefit of the act unless it be, by act of its legislature, bound to the provisions thereof by acceptance of the grant and of the terms imposed.²

Special acts of Congress, affecting several of the States—and as to them modifying these general laws—have been passed.

July 4th, 1866, Congress passed an act by which the diversion of the proceeds from the sale of lands and scrip received under the general laws above cited, from such disbursements as were requisite for, or incident to, the teaching of agriculture and the mechanic arts, to that of the theory and practice of mining, is allowed and authorized without causing a forfeiture of said grant.³

§ 5. Special provisions by acts of Congress as to agricultural colleges in specified States, have from time to time been made, adapting the general law to the special circumstances affecting such States.

An act passed June 8th, 1868,⁴ gives four years from that date within which Nevada may select the lands last above mentioned, and Sec. 4 of this act provides that the lands granted to the State of California under the Act of July 2d, 1862, and acts amendatory thereof, may be selected by that State from any lands within her borders subject to pre-emption and sale, except mineral lands, and such as to which there may be rightful homestead or pre-emption claims; double minimum lands being taken at double rates, one acre for two.

A provision as to California occurs in the Act of March 3d,

¹ U. S. Stats. at Large, Vol. 12, p. 504, Sec. 5. The periods of time have been extended as to all the States by Act of July 23d, 1866, Vol. 14, U. S. Stats. at Large, p. 208, so that the acceptance of the benefits of said Act of July 2d, 1862, may be expressed within three years from the date of this Act of July 23d, 1866, and the colleges provided within five years from the date of filing such acceptance with the Commissioner of the General Land Office. This act also extends the benefit of the original act to new States. (Ante, Note to Sec. 3.)

² The time herein prescribed is also extended, (Ante, Note 1) and even before the Act of July 23d, 1866, by Act of April 14th, 1864, an extension of time was given, (U. S. Stats. at Large, Vol. 13, p. 47) but the last extension is more general, and covers the whole ground.

³ U. S. Stats. at Large, Vol. 14, p. 85, Sec. 3.

⁴ Ibid, Vol. 15, p. 67.

1871,¹ relating, by its title, to the State of Nevada. By this act, it is permitted to the State of California to make selections, also, upon unsurveyed public lands, by making application to the Surveyor-General for their survey, and paying therefor. If there be no appropriation available for such surveys, the Surveyor-General, upon such application, must make the surveys and file the plats in the appropriate land offices, and thereafter the State has thirty days wherein to perfect its applications, and for that length of time there can be received no application other than that of the State for the land so surveyed, provided, however, that no valid pre-emption or homestead rights shall be thereby impaired.

March 16th, 1872, another act gave to Nevada until May 10th, 1877, within which to avail itself of the benefits of the Act of July 2d, 1862, and acts amendatory thereof, provided that by that date one college be provided by said State.²

Oregon has a special act by which it may select, in satisfaction of the grant by Act of July 2d, 1862, any land within that State subject to pre-emption and homestead entry, and which also confirms selections already made, except where they may conflict with valid pre-emption or homestead claims, and further providing that this State shall not, on this grant, receive more than 90,000 acres.³

Arkansas having complied with the provisions of the Act of July 2d, 1862, and the acts amendatory thereto, Congress, Dec. 13th, 1872, directed the Secretary of the Interior to issue and "deliver to the Secretary of State of Arkansas the full amount of college scrip, to wit; 150,000 acres, and 90,000 acres to the Secretary of the Board of Trustees of the Florida State Agricultural College of the State of Florida, as provided for in said act, to be used and appropriated to and for the purposes and objects in said act specified, and none other: Provided, that no scrip as aforesaid shall be delivered to the authorities of the State of Arkansas until said State shall have made some satisfactory arrangement by which the bonds of said State, principal and interest, now held by the United States as Indian Trust Funds, shall be funded in new bonds authorized to be issued by said State for this purpose.

¹ U. S. Stats. at L. Vol. 16, p. 581. ² Ibid, Vol. 17, p. 40. ³ Ibid, Vol. 17, p. 217.

Indiana is permitted to comply with and receive the benefits of said general law at any time prior to July 1st, 1874.¹

And on the 26th of January, 1873, a general act gave to each of the States which had not had the benefit of the said law of July 2d, 1862, and the acts amendatory thereto, until July 1st, 1874, to accept and receive such benefits upon compliance with the provisions therein contained and hereinbefore mentioned.²

The foregoing is a summary of this important legislation: by its terms sufficient means are provided to take the first step toward the endowment of at least one college devoted to agriculture and the mechanic arts in each of the States.³

Corresponding State laws have been passed, the grant accepted, and provision has been made for the designated colleges in many of the States.

The questions, how far the conditions of the grants, and their acceptance by the respective States, bind the recipients to an exact performance of them; to what extent, if any, material departures from these terms invalidate the titles derived under these National and State laws, are very seductive; but consideration of them would lead us away from The Law of the Farm.

¹ U. S. Stats. at Large, Vol. 17, p. 397.

² Ibid, 416.

³ In the title to this act the word "Territories" occurs in such connection as to intimate that they are, with States, to receive the benefit of the law; but inferentially they are excluded by the terms of the act, in the provision that the quantity of the land shall depend upon the number of senators and members of the lower house of Congress. Territories have no senators or representatives in Congress, within the strict acceptation of the term, and do not appear to be able to determine thereby the quantity of land to which they are entitled. (U. S. Stats. at Large, Vol. 12, p. 503, Sec. 1.)

July 23d, 1866, an act passed Congress which extended the donation to States which had been admitted after the passage of the Act of July 2d, 1862, provided such new State should, by legal enactment, within three years from the date of its admission, accept the trust, and provide for the college within five years thereafter. (U. S. Stats. at Large, Vol. 14, p. 208.)

CHAPTER II.

AGRICULTURAL SOCIETIES.

- § 6. The United States Agricultural Society.
- § 7. Statutes concerning agricultural societies.
- § 8. Agricultural societies in certain States.
- § 9. State laws as to agricultural societies.
- § 10. Statutes affecting agricultural societies.
- § 11. Statutes in certain States concerning agricultural societies.
- § 12. Summary of legislation for agricultural societies.
- § 13. Police powers by agricultural societies.
- § 14. General laws as to corporations affecting agricultural societies.

§ 6. The United States Agricultural Society.—The General Government has, in at least one instance, by the act to incorporate the United States Agricultural Society,¹ recognized the value of such associations, and by the grant of special corporate powers to a society of individuals under the name of "The United States Agricultural Society," has enabled it to exercise all of the power of incorporations, to own property, sue and be sued, receive gifts and bequests, and elect officers to control its affairs and carry out its purposes. By the provisions of the act of Congress creating this corporation, any person may become a member by paying into the hands of the appropriate and designated officer the fees of membership which may be prescribed in the company's by-laws; and provisions for the creation and maintenance of honorary memberships manifest the high esteem in which such an association was held in the minds of the legislators who made the law.

§ 7. Statutes concerning agricultural societies.—Alabama, by Act of March 3d, 1870,² providing for the incorporation of agricultural societies, prescribes the mode of procedure, and gives to them the usual powers and privileges of corpora-

¹ U. S. Stats. at Large, Vol. 12, pp. 12, 13.

² Stats. of Alabama, 1869-70, p. 308.

tions under the laws of that State; and "for the purposes of encouraging, stimulating, and furthering the mineral, *agricultural*, and other resources of the State of Alabama, all buildings, factories, works, and machinery in process of erection or heretofore erected and used, from and after the 1st day of January, A.D. 1873," for the purpose of refining cotton, wool, together with divers other products of the mineral resources of the State, are exempt from taxation.¹

California, by Act of May 13th, 1859, and amendments thereto,² has established the State Agricultural Society of California, given to it corporate powers, the right to hold real estate, establish a model farm, etc., and exempted all its funds from seizure for debt except such as have accrued during the year within which, by appropriations or donations, such funds have been received. March 12th, 1859,³ a general act for the formation of agricultural societies was passed, and by the revision of the laws, 1871-2,⁴ provision is also made therefor, by which they are permitted to hold or lease real property to an extent in area of 160 acres, to hold fairs and otherwise encourage agriculture, horticulture, improvement of breeds of horses, cattle, etc. Such corporations must not incur any debt in excess of funds on hand, other than to mortgage its lands to an amount not to exceed \$5,000; and any directors who vote for the incurring any debt other or further than as last above mentioned, are personally liable therefor. These societies are, by the law, declared to be instituted and conducted not for profit; they are to have no capital stock or income other than such as results from charges for exhibiting at their fairs, together with fees for membership; and such fees must never be greater than to raise a sufficient revenue to discharge the debt for the real estate and the improvements thereon, and to defray the current expenses of fairs.

Colorado, on the 9th day of February, 1872,⁵ finding that the Colorado Territorial Agricultural Society was in debt to the amount of \$10,000, provided for the assumption of this debt by

¹ Stats. of Alabama, 1872-3, p. 72.

² Hittell, p. 52, ¶ 275.

³ Ibid, ¶ 294.

⁴ Civil Code of California, Secs. 286, 620-622.

⁵ Laws of Colorado, Ninth Sess. p. 54.

said territory, the society securing the territory by proper deed of trust of its property, and also validated and gave effect to the proceedings of the board of directors.

Connecticut¹ has, by its laws, ordained that every incorporated county agricultural society, which shall have raised by contribution or tax upon individuals \$100 or more, shall receive from the State, in September or October, in each year, a sum equal to the amount raised by the society, not to exceed, however, \$200, the total amount to be applied to giving premiums for the encouragement of agriculture, etc.

The State Board of Agriculture,² composed of the governor, one person appointed by each county agricultural society, and four other persons appointed by the governor, meets once, at least, each year, each member being entitled to compensation for his services at the rate of \$3 per day; and it is the duty of the board to investigate such subjects relating to improvement in agriculture and horticulture, and have control over all bequests or donations made for the promotion of agricultural education; to receive reports from the county societies; and therefrom, and from such other sources as can be commanded annually, to prepare a report of the same, in a volume not to exceed 250 pages; the expenses of the board to be paid by the State. The original law appropriating to county societies has been so amended³ as to establish a sliding scale of State donations, so varying the amount as that each society which raises \$300 shall receive from the State that sum; those which raise respectively \$200 or \$100 shall have similar amounts.

§ 8. Agricultural societies in certain States.—Delaware has taken a singular position in providing, by her general police act, that public fairs are abolished and prohibited within that State, and such exhibitions are classed with horse-racing, cock-fighting, and other disreputable shows.⁴

Idaho, although not yet risen to the dignity of a State, has so far provided for this interest as to incorporate the Idaho Terri-

¹ Revision of 1866, p. 143.

² Stats of Conn. 1866-8, p. 26.

³ Stats. 1869, p. 345; Ibid, p. 290.

⁴ Revised Code Delaware, 1852, pp. 141-2.

torial Agricultural Society, and donate to it annually \$1,000, to be disposed of in premiums.¹

Illinois, in her general statute for the incorporation of societies of this character,² gives to them full corporate powers, but makes stockholders liable for debts to the full amount of subscriptions, and holds the trustees personally liable for all debts incurred in excess of the capital of the association.

To the several county agricultural societies is also accorded police powers at their fairs and exhibitions, and if incorporated they are exempt from taxation.

In Indiana, all proceeds from licenses to menageries, circuses, and similar shows, are devoted to the several county agricultural societies,³ but the society must raise an equal amount by subscription or fees; all to be devoted to award of premiums. The county society must so regulate awards of premiums as that it shall be competent for persons who farm on a small scale, as well as large farmers, to compete therefor, and must do all in their power to encourage such competition as shall tend to develop the best modes of tillage, raising crops, improving the soil, etc., in all of which the Indiana State Board of Agriculture shall give its aid, encouragement, and concurrence, by holding State fairs, and in such other modes as may be available.

Subsequent legislation permits the societies to hold and dispose of real property, assume liabilities, and makes the presidents of the several county societies ex-officio members of the State Board of Agriculture,⁴ and exempts from taxation all property of said State board.

Iowa has classed agricultural societies with corporations for the establishment of seminaries of learning, churches, and other associations not created for pecuniary profit.⁵

All county societies must so conduct their business, in the matter of awards, as that it may be competent for small as well as large farmers to contend therefor, and an amount, not to exceed \$200 annually, is donated by the State, a corresponding

¹ Laws of Idaho, Third Session, p. 198; Id. Fifth Session, p. 131.

² Stats. of Ill. Vol. 1, p. 126.

³ Stats. of Ind. Vol. 1, p. 60.

⁴ Ibid, Vol. 3, pp. 3-6.

⁵ Laws of Iowa, Revision of 1860, p. 201.

sum to be raised by the society ; to the Iowa State Agricultural Society is by the State annually appropriated \$2,000. The county judge of each county may, by a vote of a majority of the qualified electors thereof, be authorized to subscribe, for and in the name of the county, to the stock of the County Agricultural Society to an amount not to exceed \$1,000, and not to exceed \$500 in counties whose population is less than four thousand people.¹ The property of such societies is exempt from taxation,² and a further act gives to the supervisors of each county power to donate of the county funds to the respective county agricultural society a sum not exceeding \$100 for each thousand inhabitants, provided the society owns at least ten acres of land ;³ and whenever any county society has raised any sum of money for actual membership, they shall receive from the State an equal amount, not to exceed \$200.

§ 9. State laws as to agricultural societies.—Kansas has provisions similar in effect to those last above mentioned, in that, by her laws, county and State aid is extended to the several agricultural societies,⁴ the substantial difference being only in the mode of taxation prescribed for raising the money by taxation at a stated rate of assessment on the property within the county. Corporations of this character need not “list for taxation as part of their capital stock the value of their lands, but said lands shall be assessed as real property as other lands are assessed.” The president of each county society is ex-officio a member of the State Board of Agriculture, and when any such county society has raised \$50, it shall receive from the State \$200 to aid in their work.⁵

In Kentucky, the State Agricultural Society is incorporated,⁶ and annual appropriations by the State provide for its support.

In Maine, the State Board of Agriculture is composed of the governor, with five members appointed by him, two at least of whom must be from the faculty of the State College of Agricul-

¹Stats. of Iowa, Revision of 1860, p. 299.

²Id. Sec. 711, Stats. 1862, p. 32.

³Laws of 1866, p. 137; Laws of 1868, p. 175.

⁴Laws of Kansas, 1868, p. 72; Stats. 1870, p. 46; Laws of 1871, p. 67.

⁵Stats. 1872, p. 49, Sec. 8.

⁶Revised Stats. of Kentucky, Vol. 2, p. 550.

ture and Mechanic Arts, and one delegate elected by the State Agricultural Society, and one by each of the several county agricultural societies. This board holds two sessions each year, and all expenses are borne by the State, but no member receives any pay.¹

The State Agricultural Society may hold personal and real estate, the annual income from which shall not exceed \$5,000.

County and local agricultural societies may also hold property, the annual income of which does not exceed \$3,000, and each year receive from the State a donation to an amount equal to what has been raised by the society during the preceding year, "but not exceeding one cent to each inhabitant of the county, the amount so raised and donated to be devoted to granting premiums and giving encouragement to agriculture, horticulture, etc. Each society must require of all competitors for such premiums, either on animals, crops, dairy products, improvements of soils or manures, a full and accurate statement of the process or method of rearing, managing, producing, and accomplishing the same, together with its cost and value."

§ 10. Statutes affecting agricultural societies.—In Maryland, seven or more persons may form themselves into an agricultural association with corporate powers.² Such society can hold property to any amount not to exceed \$50,000, or from which is derived an annual income not exceeding \$4,000.

³ To several of the county societies, in 1872, there was granted an annual special donation by the State; and a general law gives to each county society by the State, annually, an amount equal to that raised by the society.

Massachusetts has laws by which each county agricultural society, which has raised and invested \$1,000, annually receives from the State \$200;⁴ but no society can receive, any year, more than it has distributed in premiums the preceding year. A State Board of Agriculture exists, substantially resembling that of Maine.⁵

¹ Revised Stats. of Maine, 1871, p. 478.

² Genl. Stats. of Maryland, 1860, p. 149.

³ Stats. 1872, p. 462.

⁴ Genl. Stats. of Mass. 1860, p. 376; Supplement of 1867-71, p. 821.

⁵ Genl. Stats. of Mass. 1860, p. 141.

Michigan¹ has by law provided for the Michigan State Agricultural Society, and prescribed, among other things, that any competitors for premiums shall give full data as to soil, manures used, results obtained, etc.; and that to each county society shall annually be given the result of a special tax upon all property in the county, provided the society raises \$100 or more, the whole to be expended in award of premiums, and the diffusion of information specially relating to agricultural pursuits. Such agricultural societies may hold property, not to exceed in value specified amounts for county, city, town, or village societies, which shall be exempt from taxation.

Minnesota, by general law, gives to agricultural societies power to become corporations, and specially provides for the formation of State and county agricultural societies,² but accords no special privileges.

Missouri has a State Board of Agriculture;³ also county agricultural societies. The County Court may, by order, donate of the funds of the county \$150 per year to such county societies, to be used in award of premiums, etc.

§ 11. Laws in certain States concerning agricultural societies.—In New York, by statute,⁴ local agricultural societies may be formed, with corporate powers and police regulations to govern their exhibitions. Any person who chooses to pay annually to the society not less than fifty cents, or more than one dollar, can become a stockholder, with all rights and privileges as such; and any person who pays ten dollars becomes a life member. The lands of such societies are exempt from taxation, and upon such associations is imposed the duty of obtaining and disseminating useful information on topics germane to agriculture.

Whenever a county society shall have raised, for the purposes of its organization, any sum of money not exceeding the amount under the general provision to which such society is limited, such amount so raised by the society is to be duplicated by the State.⁵

¹ Compiled Laws of Michigan, 1871, p. 705, et seq.

² Stats. at Large of Minnesota, Vol. 1, p. 452; *Ibid*, 466.

³ Wagner's Stats. of Missouri, Vol 1, p. 126, et seq.

⁴ Genl. Stats. N. Y. Vol. 3, p. 761 et seq.

⁵ *Ibid*, p. 760 et seq.

Similar provisions, so far as general characteristics go, are made for societies for improving the breed of horses, etc. Subsequent statutes make detailed applications of these laws.¹

Ohio² has made provision in this behalf, so that county or district agricultural societies shall have, from the respective counties, to them donated an amount equaling such sums as the societies may raise by contribution, donations, or fees exacted: provided, that, to raise by taxation such amount to be donated, the property in the respective counties shall not be assessed, shall not exceed half a cent to each inhabitant, and the total amount not to exceed annually two hundred dollars.

The several societies must annually offer and award premiums for the improvement of soils, tillage, crops, manures, etc., in such manner that small as well as large farmers may compete therefor. The county commissioners of the several counties are authorized to aid local agricultural societies in purchase of appropriate real property.

In Tennessee, an "Agricultural Bureau" of the State government exists,³ composed of the governor, and six members appointed by the governor, and one delegate from each county agricultural society.

The county societies in each "grand division" of the State are to hold fairs, award premiums, etc.; and to each of the three grand divisions, viz., the eastern, middle, and western division, is donated annually one thousand dollars, and to each county society is awarded annually two hundred dollars.

Wisconsin has a State Agricultural Society, which is, under the law, a corporation. County societies are also provided for, with corporate powers, and the usual privileges as to conduct of all exhibitions, fairs, etc.; the State donates annually to each of the county societies one hundred dollars, and in addition thereto the board of county supervisors of each county may annually cause to be levied a tax sufficient to raise a fund of four hundred dollars, which is also to be donated to the local county agricultural society, to be used in conjunction with

¹ Vol. 3, Stats. at Large, N. Y. pp. 761, 763, 765, 426, 733, 757, 759, 767, 768, 770, 771; Vol. 6, Stats. at Large, N. Y. p. 455; Vol. 7, Ibid, pp. 427, 457, 197.

² Revised Stats. Ohio, Vol. 1, p. 61 et seq.

³ Code of Tenn. p. 127 et seq.

funds donated, raised by subscriptions, and fees in award of premiums, etc.¹

§ 12. Summary of legislation for agricultural societies.

—The foregoing is a fair exhibit of the statute laws which create and govern agricultural societies in the United States. In each State and Territory some recognition is accorded to this class of corporations; they are treated distinctively as a specially favored class, and no other class of associations has, by the several legislatures, been treated with more marked consideration.

These societies are private corporations; as such, are competent to hold property and sue and be sued in the several Courts; they are, however, unlike most corporate bodies, not organized with a view to their own enrichment, but for the public good.

To them, corporate powers are given, not to be exercised in a manner most likely to advance the interests of the members of the society alone, or of them in their united character, but that, receiving public aid, their acts may encourage an industry upon which the well-being of the State largely depends.

§ 13. Police powers have been delegated to agricultural societies because of their *quasi*-public character; to them have been given, by the statutes of several States, some of the attributes and powers of a branch of the Government. Thus, to them is now allowed, on occasions of exhibitions and fairs, police powers to guard against disturbance and to enforce their rules; they may license or prevent minor exhibitions, shows, entertainments, etc., sell booths, and, for the time being, enjoy an existence apart from the body of the county in this respect. But, although the recipients of especial powers in this connection, it must not be supposed that these bodies are beyond the pale of the general law, or are shielded in any infringement thereof.

The powers conferred on them are statutory and exceptional; they must be exercised only within the limits and to the extent allowed by statute; and any abuse or excess in the use of such

¹ Stats. of Wisconsin, Vol. 1, p. 1065 et seq.

powers creates a liability against the corporation, which the law will enforce. Thus, in *Commonwealth v. Ruggles*,¹ there was a trial in which it appeared that at the time of the assault and battery alleged, and which was the gravamen of the action, the officers of the special police of an agricultural society, at a fair, were clearing the streets of the town from a crowd of persons for an exhibition of the trotting of horses; the highway was within the limits fixed by the officers of the society for the purpose of said exhibition. The Court held that the officers of an agricultural society have no authority to fix and define bounds within which no one can be permitted to enter, except in conformity with the regulations prescribed by them, for the purpose of exhibiting horses, or establishing a race-course or trotting-ground. The power conferred on them is a statutory one, and it must be exercised within the exact limits prescribed by law; and they have no right to include a highway within the bounds set apart by them for their exhibition, so as to obstruct the public travel thereon. It is not a proper answer for them to say that there was sufficient room for public travel on the highway outside of the limits included within their lines. They had no authority to exclude public travel from any portion of the way.

§ 14. Agricultural societies subject to general laws affecting corporations.—In accepting the benefits of a corporate existence, agricultural societies assume the responsibilities of corporate bodies; they may sue and be sued, and generally must exercise vigilance to avoid the dangers of their position rather than rely upon immunity because of their *quasi*-public character. Only by proper provision for exhibitions, guarding against danger of accidents, and care in the matter of the business which, as a body, the society has in hand, can such immunity be obtained.

In the case of *Brown and Wife v. South Ken. Agricultural Society*,² the plaintiffs brought an action to recover damages alleged to have been sustained by the female plaintiff by the giving way and falling of a portion of a building which was owned and used by defendants upon their fair grounds.

¹ 6 Allen, 538.

² 47 Maine, 275.

On the defense, it was urged that the society was but a *quasi*-corporation, such as counties, towns, and the like, against which no action will lie unless expressly given by statute, and that such associations were only *in name* corporations.

The Court held that if a natural person, on his own account, had erected such a building wherein to exhibit productions of nature or art, and an injury had thus been sustained, the common law would have afforded an ample remedy. That such a society as the defendant is not in the line of "hundreds," "counties," or "towns," a *quasi*-corporation only, but is more properly to be regarded as an *aggregate corporation*, which, as defined, consists of several persons united in one society, and they are liable for negligence, or lack of that ordinary care which the law imposes, and judgment was given to plaintiffs for the personal damages sustained by Mrs. Brown.

CHAPTER III.

CROPS.

- § 15. Growing crops the subject of contracts.
- § 16. Status of growing crops on sale of land.
- § 17. Reservation of growing crops on sale of land.
- § 18. When reservation of crop should be in writing.
- § 19. Query as to necessity of written reservation of crop.
- § 20. Value of rule that reservation of crop must be in writing.
- § 21. As to growing crop when land is mortgaged.
- § 22. Rights of tenant as to crops on mortgaged lands.
- § 23. What protection tenant can have as to his crop against mortgagee.
- § 24. Levy of execution on growing crops.
- § 25. Distinction between *fructus naturales* and *fructus industriales*.
- § 26. Exemption of growing crops from seizure.
- § 27. Construction of statutes exempting growing crops.
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- § 29. Chattel mortgages on growing crops.
- § 30. Disposal of crops before they are raised.
- § 31. When anticipated crops may be mortgaged.
- § 32. Notice of chattel mortgage on crops.
- § 33. Relation of homestead exemption to growing crops.
- § 34. Statute of Frauds as to growing crops.
- § 35. Ownership of crop dependent upon title to land.
- § 36. General propositions as to disposal of crops.
- § 37. *Prima vestura* and annual crops.

§ 15. Growing crops the subject of contracts.—Growing crops, although having no immediate value, and depending on contingencies, have yet such an existence as to be, legally, the subject of sales, mortgages, and other contracts, which pass interests to vest in possession, either immediately or at a future time.¹ But with these confessed characteristics of property, the condition of things is such that the ownership and control of the crop is, to a greater or less extent, affected by the title to the land on which it is growing.

Where land was sold by a deed conveying the fee-simple absolute, without any reservation or mention made of the crops

¹ *Adams v. Tanner*, 5 Ala. 740; *Westbrook v. Eager*, 1 Harr. 81; *Nathan v. The State*, 1 Carter (Ind.) 113.

growing upon it, possession being delivered to the vendee, it was held that the crop remained the property of the vendor, because it was deemed to be personal estate.¹ And so where the owner of the land leased the same, reserving for rent a certain proportion of the crops which should be raised thereon, and, while the crops were growing on the land, sold the premises to a third person, by an absolute deed of conveyance, without reservation of the growing crop thereon, it was held that the deed passed to the grantee the right to the rent and that the tenant must attorn to the grantee, but that the grantee could not maintain trespass against the grantor for entering upon the land and carrying away the crop.²

In another leading case, the plaintiff made to S advances upon certain personal property and a growing crop, taking as security a bill of sale thereof; S became bankrupt, but his assignee in bankruptcy waived his claim to the growing crop: defendant, a judgment-creditor of S, delivered to the sheriff a *fi. fa.* on his judgment, and thereupon the sheriff sold the crop, and the creditor became the purchaser, took and carried away the crop, and plaintiff sued for its value.

It was held that, as against the defendant, the execution-creditor and purchaser, the plaintiff was entitled to the proceeds of the crop.³

In *Bricker v. Huges*,⁴ the question was fairly presented as

¹ *Smith v. Johnston*, 1 Penn. St. 471; *Mauldin v. Armistead*, 14 Ala. 702, in which the principle is clearly recognized that, although a mere confidence or expectation entertained by a factor that a bill (drawn by the grower of a crop and accepted by the factor) will be paid out of a particular crop of cotton, will not take from the drawer the right to make an adverse disposition of the crop. The grower of the crop may, without the formalities attending a conveyance of real property, or without any conveyance of an estate in the land, convey his growing crop in trust for the payment of a debt.

² *Gibbons v. Dillingham*, 5 Eng. 9. In the same opinion, however, the law is declared to be, that a conveyance of the land, without reservation, is a conveyance of the growing crop thereon, and the discrepancy between the propositions, that such a sale of the land does and does not carry the crop, begins to appear.

³ *Congreve v. Evetts*, 26 Eng. Law and Eq. 493.

⁴ 4 Ind. 146.

To this point see also the opinion in *Frank v. Harrington*, 31 Barb. 415, in which case hops growing and maturing upon the vines were held to be personal property which may be sold by parol, although, in opposition, the point was distinctly made that they were of the nature of realty, because, the roots and substance being of the earth, the product should be considered as an incident or

to whether growing crops were to be regarded as personal property, subject only to the ordinary form of sale as such; and the ruling was that they were personal property even before maturity, as such can be sold, and the sale does not necessarily involve an interest in realty requiring a written agreement.

§ 16. By a sale of land, the crop growing on it passes to the vendee as a general rule, although growing crops, being regarded only as personal property, subject to the rules of transfer, incumbrance, and ownership of such property, it is not clear why a conveyance of the land should carry them any more than it does the live stock, which depends for its existence and has been grown upon the land.

The weight of authority, however, is against the conclusion which appears to be deducible from the reasoning last suggested, and the true rule seems to be that a conveyance of the land carries with it the growing crops, vines, trees, grass, and whatever else is attached to the soil,¹ unless there is some express exception, reservation, or stipulation to the contrary *in the conveyance*.²

Where land had been sold on an execution, it was held that a crop of corn growing thereon, not then matured, passed to the purchaser of the land.³ And in another instance, similar in

appurtenant to the land. The reason why the hops, before severance from the vines, should be deemed personal property, is by the Court said to be that the value of the crop depends on the labor, manure, and poles bestowed by the grower; but, on the other hand, in *Ralston v. Ralston*, 3 Iowa, 533, plaintiff's husband died Oct. 19th, 1851, seized in fee of certain lands. A piece of the land was, on the 12th day of March, 1852, set off and confirmed to the widow as dower in fee: on the land so set off to her was a crop of wheat, sown in the husband's lifetime, but which had not been harvested when the dower was set off. The question was, "Is the widow or the executor entitled to the wheat?" Held in favor of the widow, in analogy to the principle that if A sells a farm to B on which there are growing emblements, and does not make a special reservation of such emblements, they pass with the title to B.

¹ 4 Kent's Com. marginal page, 468.

² *Terhune v. Elberson*, 2 Penn. 726; 1 Leigh, 305. Per Carr, Judge, in *Foot v. Colvin*, 3 Johns. 222. *Wilkins v. Vashbinder*, 7 Watts, 738, overruling *Smith v. Johnson*, Ante, Sec. 15.

³ *Pitts v. Hendricks*, 6 Geo. 452. In another case, the land of a judgment-debtor was sold by the sheriff, and a deed made to the purchaser while the grain, also belonging to the debtor, was growing on the land. After the execution, acknowledgment, and delivery of the deed by the sheriff, another execution-creditor of the same debtor levied on the grain and sold it, and the purchaser of the grain at this second sale brought suit against the tenant of the purchaser at the sale of the land, for cutting and removing the grain. It was held that the grow-

effect, where a landlord leased land to a tenant to put in a crop, the land being subject to a judgment against the landlord, the tenant put in the crop, but before he could harvest it the land was sold upon the judgment, and the purchaser was held to be the owner of this crop, and not the tenant.¹

§ 17. Reservation of growing crops, when a sale of the land is made, is both common and lawful; any reservation in, or exception from, the operation of a conveyance of land, will control the conveyance to the extent designated.² By the general terms of a conveyance of the fee in lands, all which is attached to the soil is presumed to pass with the fee; but this is only a presumption, and may be met by proof of exception from the conveyance; an *exception* is always a part of the thing granted, or out of the general words and description in the grant, and so long as the reservation is not equal to the whole of the thing granted, it is valid, and cannot be deemed so repugnant to the deed as to make it void. Manifestly, however, if the reservation is as large as the grant itself, it must yield to the deed, and be treated as not having been made; and so if the thing excepted is specifically granted in the conveyance, an exception afterward appearing therein, of the same thing, would be of no legal effect; but where a deed is general in its terms any reservation of a specified portion of it is good, and the growing crops, upon the theory that it is part of the estate which would pass by the conveyance, may be regarded, therefore, as a portion of the property which may be reserved by the grantor. Where the exception is valid, the title to the thing excepted remains in the grantor, with the like force and effect as if no grant had been made.

§ 18. Reservation should be in writing, when.—Reservation of a crop, growing at the time the land is sold, should be in writing, as the presumption appears to be that the sale of the land carries the crop, and this presumption ought to be met

ing crop passed by the sheriff's sale of the land, and that the purchaser of the grain at the second sale got no title, and could not maintain the action. (*Bear v. Bitzer*, 16 Penn. St. [4 Harris] 175.)

¹ *Sallade v. James*, 6 Barr. 144.

² *Kent's Com.* marginal page, 468; *Crews v. Pendleton*, 1 Leigh, (Virg.) 297.

by evidence of as high a character as that which gives rise to it. Such, if not the settled law, is the safer rule, and appears to be correct, reasoning by analogy, as well as by the earlier rulings of the Courts.¹

The written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence of their intentions than any which can be supplied by parol. A written contract cannot be contradicted by parol, and all that which passes between parties previous to the execution and delivery of the written agreement is merged in the writing.

§ 19. Must reservation of crops be in writing? Query.

—The rule that reservations of growing crops must be in writing has been departed from, and inasmuch as to sell a growing crop, mortgage and otherwise deal with it apart from the land, as personal property rather than real estate, is a right clearly recognized, and there have occurred circumstances under which the strict letter of this rule has been departed from, in important cases decided by able judges, the rule itself must not be received without considering these cases, or regarded as absolute.

In Pennsylvania, 1852, Judge Black,² in a case involving the

¹ *Gibbons v. Dillingham*, 5 Eng. 9. This case was decided in Arkansas in 1844. Dillingham owned the land, and sold it to Gibbons by a deed, absolute on its face, conveying the fee-simple. A crop of corn was growing on the place when it was thus sold, and, after the delivery of the deed, was delivered. Dillingham commenced to harvest the corn and convert it to his own use, whereupon G objected, pulled out his deed, showed it to D, and declared that by virtue of said conveyance he claimed to be the owner of the crop; and ordered the vendor, D, to desist from removing it, but D persisted, harvested and carried away the crop, and G sued him for its value.

To this suit the defendant pleaded: first, not guilty; and second, that the said supposed trespass was committed *by leave and license of plaintiff*.

On the trial, Gibbons read the deed, proved the taking and carrying away of the crop, which was growing on the land when it was conveyed to him, its value, and rested. Defendant relied upon a parol agreement by which, at the time of the sale to G, he reserved this crop of corn; to the introduction of the evidence of this parol reservation, plaintiff objected; being overruled, excepted; and the decision of the cause, on appeal, turned on the point under consideration, which was clearly made and fully considered.

The Court held that a reservation of the crop could not be proved by parol; that the Court below clearly erred in receiving any evidence tending to show a special reservation by Dillingham of his interest in the crop, as he did not think proper to insert it in his deed.

Per Chief Justice Johnson, page 14.

² *Sachner v. Rex*, 20 Penn. St. (8 Harris) 467.

value of this rule, said: "This was trespass for cutting and carrying away certain grain, which the plaintiff alleged to be his; one of the exceptions taken is to the admission of evidence, which went to show that when he sold his land to defendant it was distinctly agreed that the growing crop of grain thereon should be reserved, and not pass with the land. The scrivener testified that both parties told him to insert this, and, finding he had not done so, requested him to interline it, but afterward agreed that it need not be done, since, as they knew it themselves, it was not necessary. The grain belonged to the vendor. The vendee had not bought it, and would not have it.

"To confine a party to the terms of a written agreement, from which an important part of the actual bargain is omitted at the request of the other party, and on his solemn assurance that it shall be performed, though not inserted, is such a fraud as the jurisprudence of no civilized country will tolerate.

"The evidence was admissible beyond a doubt. The vendor was entitled to relief in equity, though not, perhaps, under the head of mistake."¹

By the Supreme Court of Ohio² it was held that a growing

¹ The Court was not of equity, or trying a chancery case to reform the deed. The simple deduction to be drawn from the language is that a reservation of the growing crop from the sale of the land might be made in parol, because the legal proposition must stand on its own merits, apart from any consideration of peculiar hardship or special circumstances affecting the individual case under review.

² *Baker v. Jordan*, 3 Ohio St. 438. This case is, in several respects, at apparent variance with the rule mentioned in the text, and with the general current of authorities. The distinguished jurist who wrote the opinion (Warden, J.) declares the law to be: "That growing crops will pass by common deed of the lands whereon they grow, when no valid conversion of them into personalty is shown to have preceded the conveyance, cannot be doubted; but whether such conveyance *always purports* to carry the title to growing crops is another question. Many things may be in or upon the ground when a deed is made, which the parties do not intend, and which no inflexible rule of law requires, to fall under the conveyance. Such things are realty or personalty according to the intention of the parties.

"Where the vendor had allowed his tenant to put upon the land buildings and fixtures, under an agreement that he might remove them, would a deed to a stranger purport to convey them? Why not, then, construe the deed, in all cases, to be a conveyance of the buildings, and why admit proof to show that the buildings did not pass, unless it is that such proof does not vary, enlarge, diminish, or contradict the deed?

"When we consider the case of a parol sale of growing crops to A, and a subsequent deed of the land to B, we must allow that proof of such sale, and notice of its having been given to B when he took his deed, would establish satisfac-

crop might, by parol, be reserved from the operation of the deed; that it was personal property, although for some purposes regarded as a part of the realty, and that, in construing the deed, the parol understanding of the parties that the crop was reserved by the vendor will be regarded and enforced, notwithstanding the fact that the deed is absolute on its face; that the evidence of such a parol agreement is not a contradiction of the deed, but is consistent with it, and shows that what would, in some instances, go with the land under the conveyance, was by the will of the parties converted into personalty.

§ 20. The rule that reservations must be in writing questioned.—Regarding these decisions, and viewing the proposition from the stand-point of this exhaustive reasoner, the value of the rule, that the reservation of the crops from the operation of the deed must be in writing, does not remain so great as at the first glance it appears.

Conceding that the growing crop can be sold necessarily admits that the purchaser may—must—allow it to mature upon the land; he cannot prevent a sale of the realty, and the purchaser does not necessarily know that the crop is sold.

Many, if not most, of the later decisions meet this difficulty fairly by regarding the growing crops as personal property, subject only in effect to the laws controlling the disposition of that class of property, and freed from the necessity of treating them as real property, or governed by the laws affecting estates or interests in land.¹

torily that the parties to the deed never intended to treat the crop as part of the realty, or within the conveyance. Does the evidence of such intention vary or contradict the deed? I think not.

“However little favor should be shown to parol reservations made by the vendor, there must be some which are valid. It is, in such instances, a question of intent. Where that intent relates to things which may sometimes be treated as realty, and sometimes as personalty, the evidence of its manifestation in the conduct of the parties, or in their words at the date of the deed, does not seem to alter, enlarge, or limit their written contract; for, as already observed, that contract does not necessarily embrace such things.”

¹ In *Bricker v. Hughes*, 4 Ind. 146, it was held that growing crops were personal property, even before maturity, as such could be sold; and the sale did not, necessarily, involve an interest in realty requiring a written agreement.

In *Frank v. Harrington*, 31 Barb. 415, hops growing and maturing on the vines are decided to be personal property, which may be sold by parol. In this case, the point was distinctly made that they were of the nature of realty, because,

§ 21. Mortgaging of land, on which are growing crops, incidentally raises, as to the crop, the proposition last above considered, with such additional side issues as distinguish mortgages from absolute conveyances. The reasoning in *Baker v. Jordan*, Ante, Sec. 19, is not necessarily applicable, as the mortgage may have been made before the crop was put in, and in such event there would probably be no understanding whatever as to it by the parties.

The general tenor of the rulings of the Courts has been that a mortgage binds, not only the land, but the crops, while growing on it, and a person purchasing the premises under a foreclosure sale is entitled to the crops which may be grown thereon at the time of the sale;¹ that not only the land stands as security for the money loaned, but also the crops grown thereon until they are severed from the soil.²

If the mortgagor put in a crop on the mortgaged premises, he does it with full knowledge of the fact that the land, with the crop, is liable to be sold if the decree should be obtained before the crop is harvested, but the mortgagor is not necessarily injured; theoretically, upon the assumption that at the sale full value is realized from the disposition of the property; the crop, as well as the land, brings its price, and the crop is thereby paid for.³

§ 22. The tenant upon mortgaged land may lose his crop; he takes a peculiar risk, as his growing crop may enhance the value of the security without benefiting him; generally the Courts have held that where a mortgagor leases his farm the lessee has no right to crops growing thereon at the time of foreclosure and sale under the mortgage, and the mortgagee, or any other purchaser at such sale, may maintain trespass against the lessee for taking and carrying away the crops.⁴

the roots and substance being of the earth, the product could only be considered as an incident or appurtenant to the land; but the ruling was direct, and contradicted this proposition upon the reasoning that the value of the crop depended on the labor, poles, and manure bestowed by the grower.

¹ *Shepherd v. Philbrick*, 2 Denio, 174.

² *Gilbert v. Balcom*, 6 Barb. 370; *Jones v. Thomas*, 8 Blackf. 428.

³ *Crews v. Pendleton*, 1 Leigh, 297, 305.

⁴ *Lane v. King*, 8 Wend. 584. In December, 1827, Lampman executed a mortgage on his farm to King, to secure the payment of \$1,300, of which \$250 was

§ 23. The tenant cannot be protected against a mortgage on the land made before the lease ; there appears to be no way by which he can with safety raise a crop on mortgaged land, as the mortgagor cannot lease the land so as to protect the growing crop from the mortgage.

The general rule, as above indicated, is that a mortgagor, whether in possession of the premises or not, cannot make a lease so far binding upon the mortgagee as to secure to the tenant the crop which is growing on the land when the foreclosure sale is made.¹ The leading case upon this topic is that of *Keech v. Hall*,² in which Lord Mansfield reviews the whole subject, and gives his opinion in the following language :

"The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage.

"Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds."

In the same case, however, it is said, by the same learned judge, that, if the mortgagee had encouraged the tenant to lay out money, he could not maintain his action against him for conversion of the crop which was growing on the land at the time of the sale.

A settled modification of the rule, consistent with justice, appears to exist to the extent that if the mortgagee so encourage a third party as to induce him to put in the crop, or even to assent to his doing so without notifying the tenant that he will,

to be paid within one year, and the residue in four equal annual installments. In June, 1829, Lampman let part of the farm to Lane, for the term of two years, at the yearly rental of \$35 ; Lane to be entitled to the grain in the ground at the expiration of the lease. September 23d, 1829, King filed his bill to foreclose the mortgage, not making Lane a party, and obtained an order of sale in December, 1829, under which the premises were sold ; the mortgagee, King, became the purchaser, and took possession. At this time there was a crop of rye on the land, which Lane had put in under his lease, and when this grain was fit to harvest, he cut and carried it away. Thereupon, King sued Lane for the value of the rye, and, under the instructions of the Court, recovered.

On appeal, this judgment was affirmed, on the ground that the lessee of a mortgagor is not, as against the purchaser at foreclosure sale, entitled to the growing crops ; that, as between the lessee of the mortgagor and the mortgagee, or the purchaser under his foreclosure sale, there is no privity of contract or estate, and the lessee is not even entitled to notice to quit from the mortgagee on such purchase at the foreclosure sale.

¹ Hilliard on Mortgages, Vol. 1, p. 193.

² 1 Doug. p. 21.

if he get the land, claim the crop, then and in such event he will not be permitted to take it upon his foreclosure sale;¹ but how far a third party purchasing at the sale would be bound by such encouragement, permission, or consent, is questionable.

§ 24. Levy of process upon growing crops.—Distress, attachment, and execution may be made or levied upon growing crops, in accordance with the statutes of the several States. Everything produced by annual planting, cultivation, or labor is liable to distress for rent, (where distress is allowed) and may be taken, and upon due process sold on execution,² even when growing and immature.³

In such taking, the sheriff may wait until the crop is ripe, and then cut and carry it away, and sell it; but, except where by statute he is expressly required so to do,⁴ he need not wait,

¹ *Condon v. Sanford, Hill & Den. 196.* In this case, it was held that where, before foreclosure, the mortgagor leased the land, on shares, to a third party, and the mortgagee assented to this arrangement, the purchaser at foreclosure sale could not maintain the action against the tenant of replevin for the crops. The Court herein also reviews the subject of the admissibility of parol evidence to show the knowledge of the mortgagee of the terms of this letting of the land upon the husbandry contract mentioned, of his assent to the same, and of his agreement that the mortgage should not affect the rights of the grower of the crop in the premises.

The ground covered by and the conclusions arrived at are the same as in *Baker v. Jordan, Ante, Sec 19*, wherein Judge Warden, in giving the opinion of the Court, declares that such evidence is not of a character to enlarge, limit, or vary the terms of the written instrument, and is, therefore, not subject to the objection made thereto that the writing being silent as to the matter of growing crop, the presumption should be that it was intentionally omitted; that the growing crop is but personalty is also more than hinted at, and the opinion is much influenced by that view.

In *Whipple v. Foote, 2 Johns. 218*, it is asserted that wheat, growing, is a chattel, and—if raised upon the land of another, pursuant to an agreement with him and the defendant—may be levied on and sold under an execution against the latter.

² *Gwinne on Sheriffs, 220; Crocker on Sheriffs, 207.*

³ *Stewart v. Dougherty, 9 Johns. 108; McKenzie v. Lamley, 31 Ala. 526; Penhallow v. Dwight, 7 Mass. 34.* In the decision of which the Court says that corn and any other product of the soil, raised annually, by labor and cultivation, is personal estate, and may be taken in execution while standing in the field, if ripe and fit to be gathered.

⁴ As in the Statutes of Minnesota, 1873, p. 829, special provision is made as follows: "A levy may be made on grain or grass while growing, and upon any other unharvested crop, but no sale thereof shall be made under such levy until the same is ripe and fit to be harvested, and any levy thereon by virtue of an execution shall be continued beyond the return-day thereof, if necessary, and

but may sell the crop as it stands, before it is matured or severed from the ground.¹

§ 25. *Fructus naturales* and *fructus industriales*.—

Growing grass, trees, and other spontaneous growths are not regarded as chattels, or liable to seizure: they are sharply distinguished from growing crops. The latter are said to be chattels; they go, on the death of the owner, to the executor, and during the lifetime of the owner, may be taken in execution as chattels. In a New York case, where hops growing on the vines are declared to be personal property, it is admitted that they approach very near to that class of productions which can only be treated as realty, that is to say, the fruit from trees, shrubs,² etc.

With regard to *fructus naturales*, the established rule appears to be that not only grass, trees, and the other spontaneous yield of the soil are to be considered to be a part of the realty, but also the crop from such trees or other fruit-bearing plants; they are parcel of the realty, must be sold as such, and the levy of an execution is void when, and so far as, made upon trees and annual productions of the earth, as clover, timothy, spontaneous grasses, apples, pears, and peaches, while ungathered, or yet growing; these are all regarded as incident to the land. Growing trees are the subjects of grant and conveyance by deed, as something of which we predicate freehold and inheritance,

remain in life, and the execution thereof may be completed at any time within thirty days after such grain, grass, or other unharvested crop is ripe, or fit to be harvested."

¹ Craddock v. Riddlesberger, 2 Dana, 205. "The authorities leave no pretext for doubting that growing corn is a chattel, and may be sold as such by the owner, or taken by an officer in virtue of a process of *fieri facias*."

The only doubt which has been intimated is as to the proper time of selling under an execution. "But though some have expressed the opinion that the sale should be postponed until after the crop shall have become mature and been severed from the ground, it seems that, prior to an act of the last legislature, (of Kentucky) the law conceded the right to sell the corn in the condition in which it was when the execution was levied on it.

"The right to levy implies the right to sell as soon as legal notice can be given. Was it the duty of the officer to keep possession of growing corn for months after his levy, and in the meantime to cultivate and gather it, or be responsible for its loss or deterioration?"

² Frank v. Harrington, 31 Barb. 415; Evans v. Roberts, 5 Barnwell & Creswell, 829.

even though no right in the soil on which they are standing, passes, thereby, beyond that of having them stand thereon and derive nutriment therefrom till they are severed.¹

In *Bank v. Cary*,² the facts presented the question whether grass growing on land could be levied on, as a chattel, under an execution against the owner of the land, when it was turned out by defendant to be so taken, or when such levy is made by and with the consent of the defendant, the owner of the land; and it was held that properly it could not.

The distinction is clearly marked between growing crops which owe their existence to the labor, care, and fertilization bestowed on them by the producer, and growing trees, fruit, grass, and the other natural products of the earth which grow spontaneously and without cultivation.

Just how far trees and fruit-bearing plants, which are purely the result of skill and labor, manure and care, come under the rule that they are of the realty, is not well established.

All the older standard authorities declare them to be so, but the reason of the nice distinction does not appear, and in the statute law of at least one of the States the converse of the proposition is recognized, so far as nursery trees are concerned;³ but here occurs a peculiar reason for distinguishing such from other trees, in that, like crops, they owe their value to the labor and skill, etc., of the nurseryman.⁴

¹ Gwinne on Sheriffs, p. 220; Crocker on Sheriffs, p. 207; Toll. Law of Exrs. 192; 3 Bac. Abr. 64.

² 1 Barb. 542; 2 Black. Com. 122-3.

³ Civil Code of California, p. 504, Sec. 2958: it is declared that all growing crops, nursery trees, and other anticipated products, are personal property.

⁴ A. L. J. Jan. 29th, 1876, p. 70.

"A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if the license be not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license, after such severance, will become coupled with an interest, and irrevocable; and the vendee will have a right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such parol agreement." (*Owens v. Lewis*, 66 Ind. 488.)

"When, in a deed of growing trees to be removed by the grantee from the grantor's land, the terms of the grant, taken in their literal and usual sense, signify an absolute conveyance of the title of the trees, the grant is not made a conditional one by stipulation (express or implied) as to the time of removal." (*Hoyt v. Stratton Mills*, 54 N. H. 109.)

§ 26. Exemption of growing crops from seizure.—Growing crops are exempt from seizure, under distress or attachment, in Maine¹ and Vermont.² In Virginia, certain crops are, and others are not, exempt,³ and the law in West Virginia is similar in effect.⁴

In Wisconsin, certain animals are free from seizure, and the statute also exempts the necessary food to feed them for one year, whether the same is growing, or harvested and on hand, or both, as the debtor may choose, and the same provision for the support of the animals of the farm for the period of six months, occurs in the laws of Michigan.⁵

By the statutes of Colorado, there is an exemption from seizure of the provisions for the support of the debtor and his family for the period of six months, "either growing, or provided, or both."⁶

Kentucky has a like exemption of provisions for the debtor's support, and that of his family, for the period of twelve months, including growing crops.

§ 27. The construction of statutes of exemption has caused much discussion in the Courts. On the one hand, it has been reasoned that human progress toward a high standard of civilization and humanity has gradually discarded from the law the system of personal indignities to which the unfortunate debtor was subjected, and that the community is interested in

"And if no time is expressly fixed, the construction generally is that the grantee has a reasonable time for removal." (Ibid, 109.)

"If the grantee, after the expiration of such reasonable time, enters and removes the trees which were absolutely conveyed to him by the deed, he is liable, in trespass, for the entry, but not for the value of the trees." (Ib. 109; *Plumer v. Prescott*, 43 N. H. 277; *Dame v. Dame*, 38 N. H. 429.)

"An unconditional conveyance of growing trees, without the land, instantly severs them from the land, in contemplation of law, and transforms them into personal property." (*Kingsley v. Holbrook*, 45 N. H. 313.)

¹ By the Revised Statutes of Maine, 1871, p. 627, all growing crops are exempt from seizure until severed from the land.

² Revised Statutes of Vermont, 1862, p. 363, Sec. 13.

³ By the Code of Virginia, p. 286, Sec. 32, it is provided that no growing crop, of any kind, shall be liable to distress or levy, except Indian corn, which may be so taken at any time after October 15th of any year.

⁴ Code of West Virginia of 1868, p. 254, Sec. 18, is in substance the same as that of Virginia.

⁵ Laws of Michigan, 1871, p. 1742 et seq.

⁶ Revised Stats. Colorado, p. 380, Sec. 33.

provision being made to guard against the causing of pauperism by taking from the family of the debtor all means of support.

That from true humanitarian premises it must be deduced that these provisions for exemption from seizure of such implements of labor, and for support, in and pending the debtor's attempt to recuperate his financial strength, should be liberally construed, as far as consistent with the rights of others, in his favor; and that even the creditor should be interested in the laws being so administered as to encourage the debtor to make efforts to regain his lost solvency.¹

But, on the other hand, it is said that the owner of property is only conditionally so; that, if he is in debt, the property is not his own, because its very possession may well be the inducement which has led to his being trusted, and—to the extent of his indebtedness—he holds it, morally, in trust for his creditors; that statutes of exemption are innovations of the law for the sole benefit of the debtor; that he alone knows his true status financially, and has in that an advantage; and between him and the creditor, that the laws of exemption should be rigidly construed against the debtor, both in justice and from the public interest that capital should freely circulate, and credits be well sustained, by the law.²

From the decisions, and the general practice in the Courts, it is, however, now to be deduced, that the leaning, if there can be any in construction, is in favor of the debtor, and the constantly increasing leniency manifested by the statute law of the several States in this behalf, keeps even pace with the judicial humanity manifested by the Courts.

§ 28. Exemption is a personal right, which the debtor may waive or claim, at his election.³

Although it has been held that the debtor need not designate what articles he claims to be exempt—that it is for the officer

¹ *Gilman v. Williams*, 7 Wis. 329; *Connaughton v. Sands*, 32 Wis. 387; *Allison v. Brookshire*, 38 Tex. 199. "Statutes exempting property from attachment are remedial, and should be construed liberally in favor of the debtor." *Webster v. Cone*, 45 Vt. 40. To the same effect, *Kuntz v. Kinney*, 33 Wis. 510.

² *Temple v. Scott*, 3 Minn. 419.

³ *Bowman v. Siniley*, 31 Penn. St. p. 225.

to know the law, and to obey it at his peril¹—prudence dictates that the election should be made and the officer notified of it; such is the custom, and by the better array of authorities declared to be the law, that the claim of exemption is a personal privilege of the person against whom the writ runs, and that, in the absence of any such claim, the sheriff should levy.²

§ 29. **Chattel mortgages upon growing crops** are in use in most, if not all, of the States, are provided for by statute, and due provision is made for the record of them. There is, however, a point of time when a chattel mortgage, or any other disposition of a crop, can be made only at some risk. That is, when the seed has been sown or planted, but no growth above the ground has appeared.

In *The Bank of Lansingburgh v. Crary*,³ Paige, J., said: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate, and that if given one day or one week before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain one, two, or three years previous to its production."

The law as to mortgages is that whatever property, personal or real, is capable of an absolute sale, may be the subject of mortgage,⁴ but that which existed only in the hopes of the planter, without any visible existence at all, is not within any of the definitions of property.⁵

¹ *Gilman v. Williams*, 7 Wis. 329.

² *State v. Melogue*, 9 Ind. 196.

³ 1 Barbour, 551.

⁴ Story's Eq. Jur. Sec. 1021.

⁵ *Condeman v. Smith*, 41 Barb. 404. A chattel mortgage was given "of a wagon, sleigh, harness, and also all the grain growing on the lands rented, all the corn and potatoes now planted thereon, all the hay growing on the ground on said premises, all the fruit growing thereon, all the interest of the mortgagor in and to the butter and cheese to be made from the cows."

This mortgage was attacked on the ground that a chattel mortgage could only operate upon property in existence at the time of its execution, and could not be given upon the future products of land.

The ruling on this point was that at law a sale or mortgage of property to be acquired in the future, (the vendor or mortgagor neither having acquired the thing nor the agent of its production at the time of making the contract) creates no valid lien on subsisting property. But, if the future acquired property be the product of the present property in the mortgagor, as the wool growing on a flock of sheep, or the produce of a dairy farm, or anything of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. (*Taylor v. Foster*, 22 Ohio St. 255.)

§ 30. Disposal of anticipated crops.—Crops, like other personal property, must exist before they can be made the subject of sale or mortgage; this existence may be actual or potential, and in defining a potential existence, such as will render possible a sale or mortgage, the authorities are apparently in conflict upon the matter of crops which have not yet been sowed. The standard authority in the older cases appears to be Sheppard's Touchstone, (p. 24) in which it is said that trees, grass, and corn growing and standing on the ground, fruit upon trees, and wool upon the sheep's back, may be mortgaged or sold. When the crop is growing, although not matured, it may be sold or mortgaged, but when its existence has not commenced it would appear that no sale or mortgage could be made of it.¹

Such is not only the conclusion arrived at by the Court in Kentucky in a case lately decided, but the conclusion there arrived at seems to be generally accepted.²

Under the California Code,³ however, the converse of this proposition is decided to be law, two of the five justices dissenting, it being held that a crop not yet sowed, or for the sowing of which the ground had not been plowed, could be mortgaged.⁴

¹ Shep. Touch. 241, Title Grant; *Brownell v. Hawkins*, 4 Barb. 491; *Story on Bail*. 287.

² *Hutchinson v. Ford*, 9 Bush, Ky. 318. "A mortgage of a crop to be raised on a farm during a certain term passes no title if the crop was not sown when the mortgage was executed, and the mortgagee has no claim against the purchaser of the crop for its value." (3 Cent. L. J. 151, March 3d, 1876; *Milman v. Neher*, 20 Barb. 38; *Brownell v. Hawkins*, 4 Barb. 491; *Jones v. Richardson*, 10 Met. 481; *Codman v. Freeman*, 3 Cush. 306.)

³ Civil Code Cal. Sec. 2955.

⁴ *Arques v. Waston*, Sup. Court, Cal. July 24, 1876: a crop was mortgaged before the ground had been even plowed to sow the seed; a creditor attached, and the mortgagee replevied from the sheriff; the Court held the mortgage good, in the decision using the language following:

"The point chiefly relied upon for a reversal is, that at the date of the mortgage the crop had not even a potential existence, the ground not having been plowed or the seed sown; and it is claimed that there can be no valid mortgage of a thing not *in esse*. It is conceded by counsel that if the thing has a *potential* existence, as, for example, wool to be grown from sheep then belonging to the mortgagor, or butter to be thereafter produced from his cows, or a crop arising from seed already sown, the mortgage would be valid.

"The general rule undoubtedly is that a person cannot convey a thing not *in esse*, or in which he has no present interest. But it is quite as well settled that, if the thing has a potential existence, it may be mortgaged or hypothecated. 'If one, being a person, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise; for the tithes are poten-

§ 31. Crops may be mortgaged, when?—If the means of producing property is visible, tangible, and in the hands of the mortgagor, or under his control, so that *some* result therefrom is reasonably certain, such anticipated property may be made the subject of a chattel mortgage, as the wool growing upon a flock of sheep; the butter or cheese to be made in a stated season, the cows from which it is to be made being the property of, or in the possession of, the mortgagor, and due provision having been made for dairying from them,¹ and in this category may be classed growing

tially in the person. * * * So one may grant all the wool of his sheep for seven years; but not of the sheep which he shall thereafter purchase.' (Van Hoozer v. Cory, 34 Barb. 12, and authorities there cited.) 'Land is the mother and root of all fruits. Wherefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant.' (Grantham v. Hawley, Hob. R. 132.) In Van Hoozer v. Cory, Supra, the Court holds that 'the same principle is adjudged applicable to the annual crops, the fruit of the annual labor of the lessee; as if a lessor covenants that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant.' So there may be a valid grant of the grain that a field is expected to grow. (1 Parsons on Cont. 523 N. K.; McCarthy v. Blevins, 5 Yerg. 195.) In Van Hoozer v. Cory, Supra, the grant was of the cheese expected to be made from the cows of the grantor and 'the products expected to be raised upon the premises then demised to the grantor'; and this was held to be a valid grant. In that case, the question involved here was carefully considered by the Court upon a full examination of the authorities, and we are satisfied with the conclusion at which it arrived. But the same question arose in the later case of Conderman v. Smith, 41 Barb. 404, in which the ruling in Van Hoozer v. Cory was approved; and Johnson, J., in delivering the opinion of the Court, said: 'That case, (Van Hoozer v. Cory) like this, was an action, by the lessor and purchaser, against a creditor of the lessee, who had taken and sold the products of the farm and dairy upon execution; and the Court held that it did not fall within the rule which prohibits the selling or mortgaging of property not in existence, or not owned by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was, as it is expressed in the books, potentially his, and, therefore, the subject of sale.' On the rule established in these cases, the crop mortgaged to the plaintiffs had a potential existence, and the mortgage was valid.

¹ Holroyd v. Marshall, 9 Jur. N. S. 213.

In Van Hoozer v. Cory, 34 Barb. 10, the case was an action for trespass, for taking and carrying away a quantity of cheese alleged to be the property of plaintiff. The defendant justified as a constable under judgment and execution against Smith; on the trial it was shown that plaintiff leased to Smith a dairy-farm, with the cows, fixtures, and dairy implements.

The lease, in addition to the usual covenants, contains the following clause: "And it is further agreed that the said \$300 shall be paid, etc., and that all the produce and products of the farm, and cows that shall be raised and made each

crops which have an actual, tangible existence; they may be mortgaged, and when matured, or severed from the soil, the lien will ripen into actual property.

§ 32. Notice of chattel mortgage.—Chattel mortgages, when properly executed and recorded in the county where the property is, operate as constructive notice, both in and out of the county, of the lien of the mortgagee; and although the property mortgaged may be in its nature movable, yet the lien may be asserted against subsequent purchasers in or out of the county, upon the theory that the record of the mortgage is constructive notice to those who buy. The policy of permitting the lien of the mortgagee to prevail where the property is removed out of the county where the lien is of record, has been much doubted, but as to that, the question is now too well settled to be disturbed. But it would be carrying the doctrine to an unreasonable extent to permit liens to be created by mortgage, either in or out of the county where the parties live, or the property is situated, upon property not *in esse*, and a purchaser should not be required, in an investigation of the title to a crop, to go back prior to the time when the property first had any existence, in order to be informed of the right of the party in possession to sell.

Could this be otherwise, it does not appear how far back the

year, shall be and remain the property of the lessor until the sum of \$300, rent of each of said years, shall be paid."

The judge, at the trial, held that, at the time of the levy and sale by defendant, the plaintiff was the owner of the cheese, and gave judgment accordingly, which, on appeal, was affirmed upon the reasoning that "property must have an actual or potential existence, in order to be the subject of a sale; this doctrine is so well settled as to have become elementary; but a thing may be the subject of a sale, although not in actual existence, if it has a potential or possible existence, as the product or increase of that which is in existence, and the right to it when it shall come into existence is a present, vested right."

In California, "*Ah Chong*," a Chinaman, had a lease of land whereon he was growing a crop of peanuts; to secure a debt, he gave to his creditor a mortgage on the land, and turned over to him the possession of the premises, upon an agreement that the creditor should harvest the crop, and pay himself. It was held that when a debtor gives a creditor possession of a given crop, under an agreement that the creditor shall harvest it, and apply the proceeds to the payment of the debt, the creditor thereby acquires a lien on the crop superior to the lien acquired by another creditor who receives from the debtor a mortgage on the crop, after the first creditor has taken possession, and with notice of the rights of the first creditor. (*Loveson v. Golland et. al.* 45 Cal. 8.)

owner of land might not mortgage expected crops, and by record create liens on what might never exist at all.¹

§ 33. Relation of homestead exemption to growing crops.—Consideration of the exemption of the homestead from seizure and forced sale on process against the owner suggests the question, “how far does the exemption extend—are the growing crops protected?” If they are to be treated as realty, the exemption extends to the crop; but if personal property, they may be taken, notwithstanding they owe their existence to the land, which is not liable.

By the statutes of many of the States, a homestead of specified value is exempt from seizure upon legal process; upon issue raised as to this value, the Court proceeds to set apart to the head of the family enough of the farm, including the dwelling, to amount to the designated value; where no such issue is presented, the general provisions of the law constitute such a setting apart of the homestead to the beneficiary. This, however, is not a sale: it is but a change in the character of the estate which the homestead claimant has in the land, and his status as to the crop is not changed. If the growing crop is of such a character as to be liable to seizure, the fact that it grows on the homestead works no exemption, and this whether it be

¹ *Barnard v. Eaton*, 2 Cush. 296. In this case, it was held that a mortgage could not apply to goods not in existence, or not capable of being identified at the time of its execution. (*Munsell v. Carew*, 2 Cush. 50; *Cortelew v. Lansing*, 2 Caine's Cas. 200; *Wilson v. Little*, 2 Cons. 443; *Bank, Etc. v. Carey*, 1 Barb. 542.)

“A mortgage of a crop to be raised on a farm during a certain term, passes no title if the crop was not sown when the mortgage was executed, and the mortgagee has no claim against a purchaser of the crop, for it or its value.” (*Hutchinson v. Ford*, 9 Ken. 318.) Probably the strongest case in point is that of *Comstock v. Scales*, 7 Wis. 160. By the Court—Cole, J.: “The defendant in error claimed the grain in controversy by virtue of a chattel mortgage given upon it about the time the grain was sowed and planted, and before the same was up or presented the appearance of growing grain, and the Circuit Court instructed the jury, upon this point, that as soon as the grain was sown, Hatch, the tenant, could mortgage his half of the crop, and that the same would be held by the mortgage. This instruction we consider erroneous. In our opinion, a chattel mortgage can only operate upon property in actual existence at the time of execution, and cannot be given, as was attempted to be done in this case, upon a crop before it can be said to be in existence. Since the subject-matter of a chattel mortgage was not in esse at the time the mortgage was executed, there was nothing for it to operate upon.” (*Otis v. Sill*, 8 Barb. 102.)

as to the crop growing when it is set apart, or any subsequent crop.¹

§ 34. Statute of Frauds in sale of growing crops.—In the application of the Statute of Frauds to contracts affecting growing crops, the same difficulties are encountered which have heretofore been considered in the matter of the sale, mortgage of, and levy upon them, and now, in addition thereto, the special restrictions imposed by the statute should be regarded.

Generally, upon the question of whether growing crops are real or personal property, if by the sale thereof an interest in land does not necessarily pass, the English authorities have been singularly vacillating, and so inconsistent that it is more difficult to harmonize the decisions of the English Courts, and thence deduce a rule, than it has been to arrive at conclusions from the more practical ones rendered by the American Courts.² It must, therefore, be left with the reader to decide upon the relative value of the decisions as they apply to such special circumstances or cases as he may have under review, and gather from the decisions a rule applicable thereto.

§ 35. Ownership of crop dependent upon title to soil.—While growing, the title to crops can only be determined by showing that of the land whereon they are, and this title, under the statute, cannot be proved by parol;³ but it does not thence necessarily follow that, the title to the growing crop being at the outset confessed to be in the vendor, the sale of the crop is incumbered by the same necessities as to the contract of sale being in writing, mode of proof, etc.

¹ *Clements v. Lee*, 47 Geo. 625. In this case, it was held that "ordinarily the sale of land carries with it the crop then growing on it; but the laying aside of the homestead is not exactly a sale. It is the appropriation of the land for the benefit of the family, to the exclusion of the debts of the head, and does not carry with it the crop then growing on the land (which is often worth more than the land itself) to the exclusion of a lien granted by the husband on such crop."

² *Browne on Statute of Frauds*, Sec. 235.

³ It must always be borne in mind that the Statute of Frauds does not declare a certain class of contracts void, but simply determines that they shall be proved in a certain way, by writing, evidence of payment of price, delivery, etc. The statute but establishes a rule of evidence. (*Ibid*, Sec. 115.)

In *Emersen v. Heelis*,¹ a sale of turnips growing in rows or stitches was held to be a conveyance of an interest in land, and must be evidenced by writing.

So, in *Waddington v. Bristow*,² it is intimated that the anticipated product of a lot of hop roots, from which there had as yet been no sprouts above ground, sold as hops thereafter to be harvested therefrom, and to be delivered in bales, necessarily involved the transfer of an interest in the land, and must be in writing. But in *Warwick v. Bruce*,³ a case in the Queen's Bench, where a party sold all of a certain lot of potatoes then growing, it was decided that no interest in the realty was involved; and so in divers other English cases this contradiction of the cases first above cited occurs.⁴

The right to enter upon the land to gather the crop does not determine the character of the contract affecting the purchase of it, as is distinctly stated by Holroyd, J., in *Evans v. Roberts*,⁵ in that it does not materially differ from an ordinary license to the purchaser of a chattel to enter upon premises to remove it. The circumstance that the crop is not yet mature does not affect the character of the transaction under the Statute of Frauds. Under the ruling of Lord Ellenborough, in *Warwick v. Bruce*, it made no difference whether, at the time of the sale, the potatoes were covered with earth in the field, or in a box. And so the cases in England, passing the contradictions above noticed, indicate an approach to the general rule, in American law measurably settled by precedent, that growing crops may be regarded as personalty to the extent that is requisite to give force to the contract, and carry out the intention of the parties in the premises where the intention is manifestly to so dispose of the crop as to give to the purchaser no interest in the land.

§ 36. General propositions as to disposal of growing crops.—From a review of the whole subject, it appears that this is the correct rule as to the application of those parts of the Statute

¹ 2 Taunt. 38.

² 2 Bos. & Pull. 452.

³ 2 Maule & S. 205.

⁴ *Evans v. Roberts*, 5 Barn. & Cress. 829; *Smith v. Livermore*, 9 Barn. & Cress. 561; *Sainsberg v. Matthews*, 4 Mees. & Wels. 343.

⁵ 5 Barn. & C. 829; S. C. 8 Dowl. & R. 611.

of Frauds which govern contracts of this character. Where the intention is to convey a mere chattel interest in the crop, the statute does not affect it; but if it is the intention to give to the vendee an exclusive right to the land, for the purpose of making a profit from the use of the same, it is affected by the statute, and must be in writing, although it be true that nothing but the crop, as a chattel, will finally pass.

Where the vendee is not to have the crop until it is harvested, notwithstanding it is sold before it is severed, and even while growing, the sale need not be in writing; but if the property is to pass at once, and he is to be the owner while it is growing, then he has the use of the land—has, by the sale, an interest in the realty, and a verbal contract to that effect is not good.¹

§ 37. Prima vestura, and annual crops.—The distinction between natural products and the results from agriculture has been adopted in New York as being, in view of the difficulties presented, a desirable starting point from which to establish some certain rule not inconsistent with the earlier decisions.²

¹ Browne on Stat. of Frauds, Sec. 249. It is to some extent a question of delivery, and to the date when the crop is to be delivered; because, as held in *Foster v. Fletcher*, 7 Monroe, 534, "one person cannot be in possession of the land, and another of the corn growing on it"; and if it is agreed that the property is to vest in the purchaser, remain at his risk, etc., the intention to convey an interest in the land might be inferred.

So it would seem that, as the right to the growing crop follows the right of possession of the land, as in the case where a person who had a pre-emption right to a parcel of the public domain, which right was to expire on a certain day, sowed grain, which he knew would not be fit to cut before the expiration of the time within which he might purchase the land, it was held that a stranger, who did buy the land, was entitled to the crop. (*Rosor v. Quills*, 4 Blackf. 286.) By a converse of reasoning, it might be true that a right to the possession of the crop entailed a corresponding interest in the land.

Tenants have been prevented from harvesting their crops after the expiration of the terms of their leases, because their right of possession of the land had ceased, and this has been decided to be the law, whether the lease was for money rent, or on shares in the crop. (*Demi v. Bossler*, 1 Penn. St. 224; *Templeman v. Biddle*, 1 Harring. 552.)

Whitmarsh v. Walker, 1 Met. 313. In which the plaintiff bought of defendant a lot of mulberry trees while growing on defendant's land, paid a small sum, and was to take them away, and when he did so, pay the balance; no written contract was made; it was held that, under the Statute of Frauds, the sale was good without writing.

So in *Claflin v. Carpenter*, 4 Met. 580, it was held that growing timber might be sold without writing.

² *Green v. Armstrong*, 1 Denio, 550; *Warren v. Leland*, 2 Id. 613. So, also, in *Gibbs v. Benjamin*, 45 Ver. 124.

The case of *Green v. Armstrong* was upon error to the Oneida Common Pleas. Green sued Armstrong for the breach of a verbal contract, made in January, 1838, by which defendant sold to plaintiff a lot of basswood trees standing on defendant's land, plaintiff to have the privilege of cutting and carrying them away at his convenience, within twenty years; and the Court held that an agreement for the sale of trees, at the time growing upon the land of the vendor, with a right to the vendee to enter at a future time and remove them, is an agreement for sale of an interest in lands, and must be in writing.

To the same point is *Putney v. Day*,¹ where, in New Hampshire, the same ruling, in effect, was made.

So, also, as to growing trees, is the rule held to be under the statute in Vermont; and this distinction between *fructus industriales* and the natural produce of the soil is now well established and generally conceded.²

¹ *Putney v. Day*, 6 N. H. 430.

² *Chitty on Contracts*, 270-71; *Jones v. Flint*, 10 A. & E. 753; *Rodwell v. Philips*, 9 Mees. & Wel. 501, 505; *Crosby v. Wardsworth*, 6 East, 602; *Liford's Case*, 11 Coke, 48.

CHAPTER IV.

FERTILIZERS.

- § 38. General rules as to fertilizers.
- § 39. Special statutes as to fertilizers.
- § 40. State laws concerning fertilizers.
- § 41. Ownership of manure made on a farm.
- § 42. English rule as to manure on a farm.
- § 43. Rule in America as to ownership of manure.
- § 44. Title to manure, as between executor and heir.
- § 45. Title to manure on sale of farm.
- § 46. Title to manure, as between landlord and tenant.
- § 47. Usage as to ownership of manure.
- § 48. Exceptions to general rules as to ownership of manure.
- § 49. The right to collect sea-weed for manure.

§ 38. The law upon the subject of fertilizers has, from a date very early in the history of jurisprudence in England, been a subject of considerable interest, and the principles involved have received judicial consideration, in the Courts of the mother country, to an extent commensurate with the importance of agricultural pursuits, and the standard of excellence to which farming has there attained.

Of late years, with the closer husbandry entailed by population becoming more dense, and the value of manures being established by scientific and practical tests, legislative enactments and judicial construction of laws upon this subject appear in the statutes, and decisions of the Courts of several of the United States.

§ 39. Special statutes as to fertilizers in Alabama, Georgia, Maryland, and New Hampshire:

In Alabama, an "inspector of fertilizers" is appointed by the governor; under the inspection of this officer, and his subalterns, all packages of commercial or prepared manures are stamped in a manner indicative of their power and value, and

none can be sold unless so inspected and stamped, without violating the law and incurring a penalty of \$1,000.¹

Georgia has a statute resembling that of Alabama; the State chemist, appointed by the governor, is also "inspector of fertilizers," and all imported and manufactured fertilizers must be by him inspected and stamped, so as to indicate their character, value, etc.; and any person who shall sell such merchandise unstamped is guilty of misdemeanor.²

In Maryland, a similar officer has like duties, and he also must give analyses of manufactured, "manipulated, or imported manures," and each package offered for sale must have attached thereto printed or stamped labels, truthfully showing the character and value of the article, the weight of each package, with the vendor's name and place of business.

If the article proves false to label, the buyer may recover the price paid, the seller is liable to indictment, and no agreement between the buyer and seller can exempt the latter from indictment for violation of these provisions.³

A supplemental act permits the grower of crops to pledge the crop, where the manures have been bought on credit, for the payment of the debt so created, the lien to have precedence over all others except that of the landlord for rent.⁴

New Hampshire has a law providing that dealers in "commercial" or "manufactured" manures shall label or otherwise mark each package so as truthfully to show what it is, its weight and strength, and any violation of law renders the offender liable to pay a fine of \$20 for the first and \$40 for each subsequent offense.⁵

§ 40. State laws upon the subject of fertilizers.—North Carolina has a statute prescribing that every package of "commercial manure" or "manufactured guano" shall be stamped as by the laws provided, and also that the vendor shall furnish to the purchaser truthful chemical analyses of the contents of the packages.

¹ Acts of Alabama, 1870-71, p. 68.

² Code of Georgia, 1873, p. 270.

³ Maryland Code, Supplement of 1870, p. 85.

⁴ Ibid, p. 84.

⁵ Laws of New Hampshire, 1867-71, p. 285.

Persons dealing in fertilizers not marked as above required, or who fraudulently affix any mark or label which untruthfully states the contents and character of the package sold, forfeit such manures, and render themselves personally liable for damages. Deficiency in any of the ingredients indicated by the mark or label is made a bar to the recovery of the debt created by the purchase of the manure.

Any person, instituting suit, can have an analysis made by the State geologist, and his certificate is presumptive evidence of the ingredients of the article sold. Several persons may unite in one such suit.¹

Virginia, by statute, provides for the proper marking of all packages of fertilizers with the name of the manufacturer or dealer, his place of business, with the weight, value, and analysis of the contents of each package offered for sale.

For breaking this law a penalty is imposed of one hundred dollars on the first and two hundred dollars for each subsequent offense, and the vendee may recover the price paid.²

Such are the general features of the laws of States where the trade or business of dealing in fertilizers is governed by special statutes. In some States there are also restrictions upon non-residents from gathering, on the sea-shore, fish for manures, to be carried away, but such laws are local and of but little general value.

§ 41. Manure made on land belongs to owner of the soil.—Manure made upon the land, in the course of husbandry, becomes a part of the farm, and is generally subject to the laws governing real estate. In England, from the complicated relation of landlord and tenant under agricultural leases, exceptions to this rule, by local customs and peculiar circumstances, have so often occurred that the rule sometimes appears to be lost;³ but,

¹ Public Laws of N. Car. 1871-72, p. 366-7.

² Acts of Assembly of Virginia, 1870-71, p. 294.

³ 2 Kent's Com. 348, Note 1, in which the distinguished writer says: "It would seem to be the law in England for the outgoing tenant to sell or take away the manure (*Roberts v. Barker*, 1 Cr. & M. 809). A critical examination of the case cited develops the fact that the decision turns upon the effect of an express stipulation where there is a custom which otherwise controls. A tenant held under a lease which contained an express agreement by which he covenanted not to sell or take away any of the manure in the fold, but should leave

notwithstanding the multitude of qualifications and exceptions which cover it, the rule can be found underlying them.

§ 42. English rule as to manure made on the farm.—

By the English authorities, it is generally conceded that an agreement to cultivate lands in a husbandlike manner is an obligation not to carry away any of the straw, dung, or compost, but to use them for enriching the soil;¹ and that, although under local usage the contrary might prevail as a custom, the general rule of law is such that the manure should remain upon, and it is a part of, the realty. But the converse of this proposition has sometimes been held to be true: that there was no rule whatever in the premises, and that local custom controlled entirely.² But the custom must be so well established as to cause the presumption that the contracting parties knew of the local usage, had it in mind in making the contract, and are therefore deemed to have entered into the relation with reference to the subject-matter upon consideration, based upon the custom.

it for the landlord or the succeeding tenant; but there was in the lease no stipulation as to the tenant being paid for the manure.

By the custom of the country, the tenant would have been bound not to sell or take away the manure, but, leaving the last year's manure on the premises, he would have been entitled to receive pay for its value.

It was held that an express agreement as to leaving the manure had been inserted in the written lease; that circumstances evidenced that the minds of the contracting parties had met, and the result was the written stipulation which, perforce, proved that no reliance was placed upon the custom; that, therefore, the custom not being in their minds, it formed no part of the contract, and should be disregarded; no pay was accorded for the manure.

Hence it would seem that the local custom, rather than the law, gave the manure to the tenant; and, granted the premise that a custom was requisite to give to him the manure, the law, apart from the custom, left the title with the land.

But *Leniar v. Armitage* (Holt's cases of *nisi prius*, 197) directly controverts this case of *Roberts v. Barker*, and decides that where a written agreement of lease, upon a matter of this character involving a custom, does not in terms exclude the custom, such custom will prevail and remain in effect.

In *Webb v. Plummer*, 2 B. & A. 746, the doctrine of *Roberts v. Barker* is sustained, and *Leniar v. Armitage* commented upon without approval.

¹ *Powley v. Walker*, 5 D. & E. 373.

² In *Hutton v. Warren*, 1 M. & W. 466, it is said that the obligation to expend manure, and right to remove it, must, in every case where there is no express contract, be governed by the custom of the country; there is no rule of law on the subject irrespective of such custom; "*farmers are more fit than lawyers to decide such a question.*"

§ 43. Rule in America as to ownership of manure.—

In America, it is reasonably well settled that the manure made on the farm is a part of the realty, and, upon a sale of the land, passes to the vendee under the deed.

The case of *Kittredge v. Woods*¹ is not only a leading one, but states the doctrine now prevailing throughout the United States, with certain rare exceptions.

The action was trespass, for breaking and entering plaintiff's close and carrying away forty loads of manure. It appeared, on the trial, that the plaintiff was tenant of the farm, where the manure was made by cattle about the farm, in 1823. In 1824, plaintiff purchased one-half of the farm, and defendant the other half, and these parties held it in common until the 6th of April, 1824, when they divided, and defendant conveyed to plaintiff all of his interest in the part of the farm where the said manure was. Afterward, defendant entered and took away one-half of the manure, and thereupon the controversy arose, and the sole question involved was, "whether, when land is sold and conveyed without any reservation, manure lying upon it goes to vendee with the land?"

The learned judge who wrote the opinion (Richardson, C. J.) says: "As we find no adjudged case in which this question has been directly settled, we shall, in order to avail ourselves of the light which analogous cases offer, take a broader view of the subject than the relation between the vendor and vendee presents. Many things which are not affixed to the freehold go to the heir as appurtenances to the inheritance. Thus, it is said that young doves in a dove-house, not able to fly, belong to the executor. But the old doves go, with the dove-house, to the heir. (*Wentworth*, 57; *Godolphin*, 116.) So, keys of doors go to the heir, (*Wentworth*, 62) and chests containing the title-deeds of the inheritance (*Wentworth*, 64).

"And we are inclined to think that the principles of these decisions will give to the heir the manure which may have been carried and left upon the field in heaps for dressing, or which may be left lying in heaps about the barn, upon the land.

"It is well settled that when land is sold, whatever corn is

¹ 3 N. H. 503; *Lee v. Risdon*, 7 Taunt. 191; *Elwes v. Mawe*, 3 East, 38.

upon the land passes, and we are of the opinion that all manure, whether it be in heaps about barns, or in other places upon the land, goes with the land to the vendee."

§ 44. Title to manure as between executor and heirs-at-law.—One of the most common cases where a question of this kind may arise, is between executors or administrators on the one point, and heirs-at-law on the other. It is said, in the English books, that the line, in this instance, is drawn more closely there than in any other.¹ And it seems to have been settled that whatever has been in any way attached to the freehold for the benefit of the inheritance, and is necessary to its enjoyment, shall go to the heir.

Thus, in *Lawton v. Salmon*, 1 H. Bl. 259, note, it was decided that salt pans, used in the manufacture of salt, although they might be removed without injury to the building, should go to the heir.

Many things which are not affixed to the freehold go to the heir as appurtenances to the inheritance. Thus, it is said that young doves in a dove-house, not able to fly, belong to the executor, but the old doves go with the dove-house to the heir. So keys of doors go to the heir, and chests containing the title-deeds to the property pass to the heir. And so, by analogy, it appears that the principles of these decisions will give to the heir the manure which has been carried and left upon the fields in heaps for dressing, or which may be left lying in heaps about barns upon the land.² Such was the conclusion arrived

¹ In these cases, the contest arose as to certain fixtures, whether they went to the heirs or executor. It was held that the fixtures necessarily went to the heir, because they were of the realty.

It was said that the right between landlord and tenant did not altogether depend upon this principle. Many articles which, though originally chattels, might, when attached by the tenant to the freehold, cease to be such by becoming part of the freehold; and though it is in his power to reduce them to personality by removing them during his term, they remain, so long as affixed, a part of the realty. (*Strong v. Doyle*, 110 Mass. 93.)

"Manure made in the course of husbandry, upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it." (*Fay v. Mazzy*, 13 Gray, 53.)

² Fencing materials on a farm, part of the freehold, and if they are temporarily down or detached, without any intent on the part of the owner to put the fencing materials to another use, they still continue to be regarded as fixtures.

at in this case, and it has been agreed with in similar cases where they have arisen in the other States, except the instances and to the extent hereinafter noticed.

In *Massachusetts*,¹ it was held that manure from the barnyard of the homestead of an intestate, standing in a pile on the land, although not broken nor rotten, and not in a fit condition for incorporation with the soil, is not assets in the hands of the administratrix, and she is not chargeable therewith as part of the personal estate.

Manure made in the course of husbandry upon a farm is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as an appurtenant to it.

The reason of the rule is, that it is for the benefit of agriculture that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composed with the earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so

(*Goodrich v. Jones*, 2 Hill, 143, and to the same point, *Walker v. Sherman*, 20 Wend. 639.)

So, also, it has been held, where hop-poles had been used the preceding year, but, the crop being harvested, the poles had been piled up on the farm for use the next year, that the poles, though wholly out of the ground, and in piles, were in effect fixtures, and not subject to be treated as personal property. (*Bishop v. Bishop*, 11 N. Y. 123.) One of the judges dissented.

¹ *Fay v. Mazzy*, 13 Gray, 53.

The ground on which the learned judge (Hoar) places this rule is that the manure, having been originally from the soil, should, to keep the estate in equalized value, return to it the enrichment of the droppings, does not appear to have been always the predicate of the proposition. In an old English case, *Hindle v. Pollett*, 6 Meeson & Welsby, 529, a tenant had stipulated that he would put and spread all the manure and compost then collected on the farm, and that he would not take away or sell any such from the premises. The tenant was attached, and sold out. His neighbor bought two of his cows, and, for convenience, left them in a pen on the land; brought from other premises hay, fed them there for a couple of days, and took away the manure—the droppings from the cows which he had bought, and which were from his feed. Held, that the manure belonged to the landlord, the owner of the soil, and that to take it away was a breach of the covenant.

Lord Abinger says: "The question is not by whose provender the manure was produced, but whether it was made on the farm. Now, suppose the farm was near some place where a large fair was held, and it was convenient to the farmer to take in the cattle brought to the fair for several hours, would he have a right to remove the manure made by these cattle? Would not all their droppings be manure made on the farm? Clearly so. This is manure made on the farm—the produce of the farm—and must be so regarded."

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essential to its successful cultivation, should be retained for use upon the land.

Such is unquestionably the general usage and understanding, and a different rule would give rise to many difficult and embarrassing questions.

§ 45. On sale of farm, manure goes with the land.—

Upon a sale of the realty, the manure upon the farm goes with the land. Such was the reasoning in *Goodrich v. Jones*,¹ in which case Jones contracted to sell a farm to Goodrich for a money consideration, payable April 20th, 1836. Under this agreement, Jones, by Goodrich's consent, conveyed a part of the farm to one Vose, and the residue to Goodrich, who claimed and converted to his own use certain fence-boards lying on Vose's part, and certain manure in the barn-yard on his own part.

This was after the deeds were executed. At the time of the execution of the deed to Vose, the boards were on the premises; they had all been in fences on that part, and some still remained so, though a good many were displaced, some let down, and some blown down. The manure lay in the barn-yard, on Goodrich's part, where it had been accumulating for a long time. The conversion of it by Goodrich was proved.

The question was squarely before the Court as to the character of the property in the fence-boards and manure. It was held that both the fence-boards, temporarily detached, and the manure, were part of the freehold, and passed by the deed.

The manure belongs to the farm whereon it is made. This is in respect to the benefit of the farm and the common cause of husbandry. It makes a part of the freehold, and passes to the vendee.

§ 46. Ownership of manure as between landlord and tenant.—As between landlord and tenant the manure belongs to the former, unless there is an express stipulation to the contrary. If a farm is leased for agricultural purposes, there is raised between the parties to the transaction a contract by implication, where such, in terms, is not in the lease, that the tenant, on his

¹ 2 Hill, 142.

part, will conduct his operations and care for the farm in a workmanlike manner in accordance with good husbandry.

Such a covenant, from the nature of things, implies that the manure should be used in the farming operations; every tenant is bound to cultivate his farm in a husbandmanlike manner, and to consume thereon the manure produced on it. This is an engagement that arises out of the letting, and which the tenant cannot avoid without violating his contract;¹ and at the end of the term such manure as remains on the premises the tenant has no property in; he has no more right to remove it before the expiration of his term, or to dispose of it to others, than he has to remove or dispose of any fixture belonging to the farm.

§ 47. Usage as to title to manure.—Implied contracts of the character above indicated, however, are liable to meet with exceptions and to succumb to the rule that local usage and well established custom may waive the implication, and possibly not only destroy it, but raise another contract the reverse of that suggested above.

Parties contracting to do a certain business, or enter into relations with reference to well defined pursuits in a neighborhood devoted to occupations of a like character, such as husbandry, where a large class of the people are engaged therein, may well be supposed to have made their engagement with a view to do the business in the way which is there customary; and if there is a well defined usage as to any particular matter, such, for instance, as the mode of cultivation, or use of manure, such custom would control and characterize the implied contract.²

¹ *Middlebrook v. Corwin*, 15 Wend. 169; *Taylor's Land and Ten.* 541 et seq.; *Daniels v. Pond*, 21 Pick. 367.

² *Parsons on Contracts*, p. 537, Vol. 2; *Strong v. Doyle*, 110 Mass. 92. In this case, while defendant was negotiating for the purchase of plaintiff's farm, the parties made a distinct oral agreement for buying the manure on the farm, the plaintiff agreeing to put up the manure at auction for sale and the defendant to take it if he was the highest bidder. The plaintiff conveyed the farm to defendant and put up the manure for sale at auction, but the defendant forbade the sale, claimed the manure as his own, and spread it upon the land. Held, a conversion of plaintiff's property. (*Collender v. Dinsmore*, 55 N. Y. 200; *Cash v. Hinkle*, 36 Iowa, 628.) "A custom cannot be set up against the clear intention of the parties to a contract as expressed therein, but the words of a contract must be construed in reference to a custom affecting the subject and known to the parties, that the true intention may be ascertained." (2 *Parsons on Cont.* Sec. 9; *Ruandskoff v. Brett*, 14 Iowa, 102.)

Even in written leases, where nothing is said upon a topic in which is involved a well established usage, the same rule appears.¹

The object of language is to express the meaning of the parties, and words have frequently a local and special significance; it is in the sense in which they are used that, to give effect to the agreement, they must be understood, and so the true condition of the minds of the contractors is arrived at by considering them to have had in view the custom in point and with which they were familiar.

§ 48. Exceptions to general rule as to manure.—In North Carolina, the converse of the general rule that manure on the farm is part of the freehold has been held to be law.² In that State occurred a case in which there was neither custom nor agreement: the tenant, the plaintiff, purchased the land in 1841; the defendant had been tenant of the former owners, and before the date of the plaintiff's purchase had raked into piles the manure which had been made on the place during his tenancy, and especially that which was taken from the pig-pen.

After the purchase of the land by plaintiff, the defendant remained on the farm, removed the manure, and then delivered the premises to plaintiff, and plaintiff sued for the value of the manure. The Court held that the outgoing tenant, where there is no covenant or custom to the contrary, has a right to all the manure made while he is on the farm, and that it was his personal property.

This decision is, however, so far out of line with its fellows that it should not be regarded as law: even the cases which, in the report of this one, are cited, upon analysis do not bear the construction ascribed to them, and the safer course is to disregard this case; such is also the opinion of a distinguished writer on the subject of landlord and tenant.³

¹ "Every demise between landlord and tenant, in respect to which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or the district where the land lies." (*Van Ness v. Paskara*, 2 Pet. 137.)

² *Smithwick v. Ellison*, 2 Ired. 326.

³ *Taylor's Landlord and Tenant*, 541, in which the author, after stating the law in accordance with the text, says:

"A different rule, however, has been laid down in South [North] Carolina, where it is held that a tenant who is about to remove has a right, if there is no

§ 49. The right to collect sea-weed for manure appears to be in the public so far as it may be found upon the strip of land lying between high and low-water mark. Such would seem to be the inevitable result of the public ownership of this belt of land which is covered and left bare by the advancing and receding tides. In the sea-weed there is no title until it is somewhere deposited. In a state of nature, fast or floating, it is the property of no one. It has never been subjected to the law of "prime occupancy," which is the foundation of all title. It has grown upon no man's land; it results from no person's labor, care, or skill, and has been reduced to possession by no one. Like wreck, or treasure trove, or animals *feræ naturæ*, its title vests in him who first takes possession of it.¹ This possession is deemed to be taken by the owner of the land when it is left upon that part of the shore which belongs to the riparian proprietor, somewhat upon the principle by which title is acquired to soil made by "accretion" or "alluvion."

From the authorities, it is not clear how title to sea-weed is thus obtained. The ownership of personal property may be acquired by what, in law, is called accession; but, to acquire title by accession, the accessory thing must be united to the principal, so as to constitute part and parcel of it, and sea-weed cannot be strictly considered within this definition, for its sole value is as manure, generally to be used at some place other than where first deposited.

But by whatever trains of reasoning the rule has been established, it has long been the law that sea-weed cast upon soil belonging to a riparian proprietor vests in him, because of the ownership of the soil.² The right to the sea-weed accumula-

covenant or custom to the contrary, to all the manure made by him on the farm; that it is his personal property, and he may remove it as such; but this case is clearly at variance with all other American decisions on the subject."

¹ 2 Bla. Com. 401; *Haslem v. Lockwood*, 34 Conn. 500.

² *Church v. Meeker*, 34 Conn. 428; *Eman v. Trumbull*, 2 Johns. 314; *Phillips v. Rhodes*, 7 Met. 322.

"The right of a proprietor bounding upon the sea terminates at ordinary low-water mark, and he has the right to sea-weed cast by extraordinary floods above ordinary high-water mark. As owner of the soil, he is constructively the first occupant of it. But sea-weed cast and left upon the shore—that is, between ordinary high and low-water mark—belongs to the public, and may be lawfully appropriated by the first occupant." (*Mather v. Chapman*, 40 Conn. 382.)

tion is of the character of *profits a prendre*, or those taken and enjoyed by the mere act of the proprietor himself; and the right to so take depends upon the right which the party has upon the lands where the property is found, and this again depends upon the title to the soil.

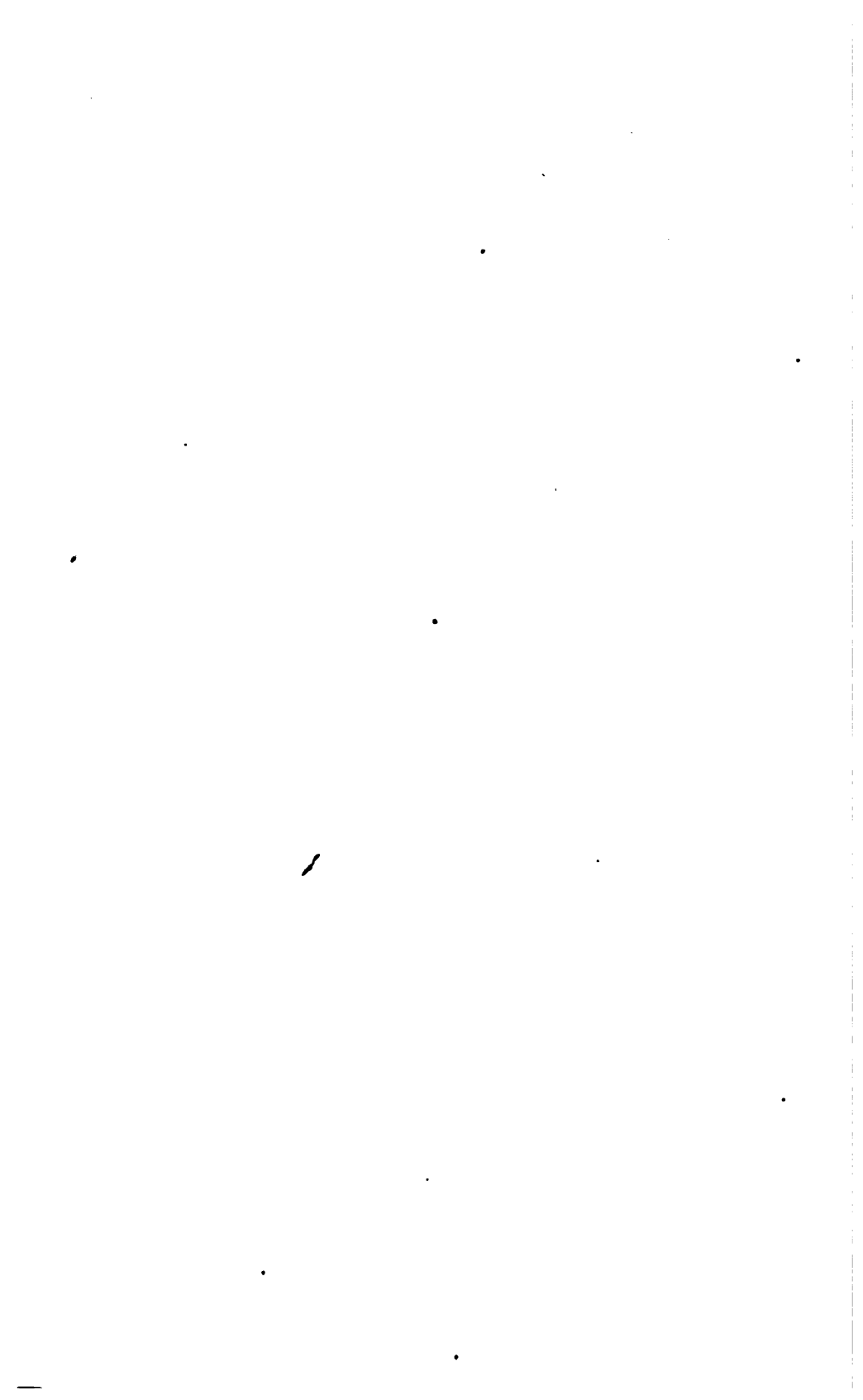
With the exception of the States of Massachusetts, Maine, and New Hampshire, the ownership in the soil of the riparian proprietor stops at high-water mark. In those States, by a provision and ordinance in 1641, passed by the colonial legislature of the Massachusetts colony, the fee of riparian proprietors was extended one hundred feet from high-water mark, and this provision has been accepted as the law in the three States above mentioned; but they are exceptional to the general rule that the right of soil of owners of land bounded by the sea, or on navigable rivers where the tide ebbs and flows, extends to high-water mark; and the shore below common, but not extraordinary, high-water mark belongs to the State, as trustee for the public.¹ This last may, however, be sold by the State to an individual, and by prescription title may be acquired to it; and, when so acquired, title to the land between high and low-water mark would carry with it the right to sea-weed deposited.²

¹ 3 Kent's Com. 427.

² 3 Kent's Com. 427; *Gould v. Hudson R. R. Co.* 6 N. Y. 522; *People v. Tibbitts*, 19 N. Y. 523; *Mather v. Chapman*, 40 Conn. 396; 2 Bla. Com. 292; *Church v. Meeker*, 34 Conn. 421; *Peck v. Lockwood*, 5 Day, 22; *Hale de Jure Maris*, Chap. 6; 2 Bla. Com. 401; *Haslem v. Lockwood*, 37 Conn. 500.

Part · II.

DAMAGES.



CHAPTER V.

INJURY BY FIRE.

- § 50. General rule as to damage by fire.
- § 51. No redress for damage by unavoidable accident.
- § 52. Common-law rule as to damage by fire.
- § 53. One may burn stubble, when.
- § 54. One may burn rubbish or wood on his land.
- § 55. As to burden of proof of negligence in case of fire.
- § 56. Proximate damages alone recoverable.
- § 57. Statutes as to damage by fire.
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- § 60. Liability of hunters or travelers for damage by fire.
- § 61. Damage by fire from steam thresher.
- § 62. Negligence in use of steam thresher.
- § 63. Duty of proprietor of steam thresher to use appliances to prevent escape of sparks.
- § 64. Owner of steam thresher not an insurer.
- § 65. Fires caused by locomotives, common-law rule.
- § 66. Rule in America as to fires by sparks from locomotives.
- § 67. Statute as to fires from locomotives.
- § 68. State laws as to fires from locomotives in America.
- § 69. Value of common-law rule as to fires from locomotives.
- § 70. Burden of proof of negligence when fire occurs from locomotive.
- § 71. Duty of railroad corporation to guard against fire.
- § 72. Care required to prevent escape of fire from locomotive.
- § 73. Duty of railroad company to extinguish fires caused by locomotives.
- § 74. Proximate and remote damage by fire from locomotive.
- § 75. Liability of railroad companies for damage by spread of fire.
- § 76. Duty of farmer to guard his crops against fire from locomotive.
- § 77. Farmers not bound to guard against fire.

§ 50. General rule as to damage by fire.—By the common law, one who negligently sets fire to any building, rubbish, or anything upon his land, was liable for the damage which resulted from the spread of the fire to his neighbor's premises.¹

The owner or possessor of property is, in general, responsible that it be so used as that others receive no injury; and where such injury happens from the negligence of a person about the

¹ *Beaulieu v. Fringham*, Year Book, 2 H. IV, f. 18, pl. 6.

premises, it lies upon the owner to absolve himself, whether the damage results from his own act, or that of his servant, or other person acting under his direction.

The principle is, that every man is bound to so deal with his own property as not to injure that of others, and, therefore, if a fire occurs by the negligence of the owner of land on which it originated, and by the fire his neighbor's crops, buildings, or other property is destroyed, he whose negligence has caused the damage must be held liable for it;¹ but he is not liable if the accident was inevitable, or he was not in fault.

§ 51. No redress for damage by inevitable accident, or for losses resulting from mutual negligence.—But when the injury comes from the negligence of one party, he cannot shield himself from liability by calling it an accident.

A man is answerable for the natural and probable consequences of his fault. But if his fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable.

If, however, a man engage in an act which the circumstances indicate may be dangerous to others, he must take all the care which prudence would suggest, to avoid an injury.

§ 52. Common-law rule as to damage by fire.—Certain English statutes, enacted before the separation of the American colonies, relieved the owner of real property from liability for the spread of fire which commenced on his land accidentally, even though the commencement of the fire was due to his negligence; and the Supreme Court of New York has held that these statutes are to be regarded as part of the common law as adopted by that State, and that, on principle, a man should not be held responsible for damages which result by spread of fire which accidentally caught on his land, even though he was negligent in allowing it to begin.² The opinion of Blackstone seems

¹ *Altherf v. Wolf*, 22 N. Y. 335; *Booth v. Mister*, 7 Carr. & Payne, 66; *Blake v. Ferris*, 1 Seld. 48; *Vaughn v. Menlove*, 3 Bing. N. C. 468; *Barnard v. Porrt*, 21 Pick. 378; *Hanlon v. Ingram*, 3 Clarke, (Iowa) 81.

² *Lansing v. Stone*, 37 Barb. 15; 3 Kent's Com. 436, Note C; *McGrew v. Stone*, 53 Penn. St. 436.

to be in accord with this proposition.¹ But the general construction of these statutes, even in England, leaves the original common-law rule in force, and does not materially vary or modify it.²

¹ Bl. Com. 431.

² *Vaughn v. Menlove*, 3 Bing. N. C. 468 ; 4 Scott, 244, in which the defendant stacked on his land some hay in such condition as that there was danger of its taking fire from spontaneous combustion ; he was warned of its liability to take fire, and advised to take the rick down, but replied "that he would chance it." It did take fire, and was not only destroyed, but the fire, spreading to the plaintiff's land, there burned his cottage. Defendant was held liable, on the ground that, though an accident, the fire was attributable to his culpable negligence, and he ought to respond to the damage done.

In *Canterbury v. Attorney-General*, 1 Phillips, 306, Lord Lyndhurst comments upon this case, and questions the soundness of the decision, because the statutes of Anne and George III appeared to have been overlooked ; but in *Filliber v. Phippard*, 12 Q. B. 347, the doctrine of *Vaughn v. Menlove* was to be law upon the proposition that those statutes applied only to fires purely accidental. It should be considered, however, that the point was not absolutely involved in this case of *Filliber v. Phippard*, as the fire was not accidental at all, but was purposely lighted by defendant on his land, and thence spread to his neighbor's.

In *Barnard v. Poor*, 21 Pick. 378, the common-law rule was held to be law, and that the statutes of Anne and George III were, in effect, declaratory of it. It was held that an action on the case would lie for so carelessly carrying fire by defendant as that plaintiff's stock-yard was destroyed. But in *Maull v. Wilson*, 2 Harring. 443, it was held that an action would not lie for damages from a fire which was purely accidental, but spread from defendant's to plaintiff's premises. In a late New York case, *Webb v. R. W. & O. R. R. Co.* 49 N. Y. 425, the law was discussed at length, and the opinion of the Court was : "It certainly is not a novel proposition that he who, by his own negligence or misadventure, creates or suffers a fire upon his own premises, which, burning his property, spreads thence on to the immediate adjacent premises of another, and there destroys the property of the latter, is liable to him in an action for the damages which he has suffered. This rule was founded on the general custom of the realm ; in other words, it was the peculiarity of the common law, and it has its support in the maxim, 'every man must use his own so as not to hurt another,' and it was applied, not only to the case of a fire arising in a house, but to that of one arising on the open land ; and not only where the fire was intentionally set and carelessly managed, but where negligently kindled. At first it was held that the defendant was liable, though guiltless of negligence, and that he could defend himself only by showing that the fire was excited by some superior cause which he could not resist nor control. And so firmly fixed was this rule in the common law that there must needs be a statute to soften its rigor. (6 Anne, Chap. 31, Sec. 67 ; and 14 Geo. III, Chap. 78, Sec. 76.)

"We have the common-law principle well established, thoroughly recognized, and still existing to this extent : that he who negligently sets or negligently manages a fire on his own property is liable to his immediate neighbor for the damage caused to him by the spread of the fire on to his neighbor's next adjacent property. It is urged that the statute of Anne, as amended by that of the third George, is a part of the common law of this State, and that thereby it is

§ 53. A man may burn stubble on his land, or use fire in any manner to clear his land, so long as he exercises ordinary care and prudence in guarding against its spread, or setting fire to another's property.

One who willfully lights a fire upon his own premises must use at least ordinary care to avoid its spread to the premises of his neighbor. It would, unquestionably, be culpable negligence to start a fire in any place where, to a person of ordinary intelligence, it is apparent that a spread of the fire and injury therefrom to another is reasonably to be feared.¹

§ 54. One may burn rubbish or wood on his land.—The owner or occupant of land has a right to use fire to consume rubbish, wood, or other things, and to clear his land for cultivation, and, having this right, if he use it with ordinary care to prevent the spread of fire, he cannot be held liable for damages if the fire extend to his neighbor's land and there destroy or injure property.² So a man has the right to burn the stubble on

provided that 'no action, or suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall *accidentally* begin, nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding.' It is not needed that it be determined whether the claim that these statutes are a part of the common law of this State is well founded. It is sufficient to say of them that they apply only in a case in which the fire did *accidentally* begin, and that it has been held, on grave consideration, that a fire arising from negligence is not one which does accidentally begin, and that the statutes referred to afford no defense to one who negligently sets or manages a fire."

¹Teall v. Barton, 40 Barb. 137; Keefe v. R. R. Co. Sup. Ct. Minn. January, 1875. "The owner has the absolute right to use his property as he pleases, except so far as the effect of such use may be to invade or infringe some right existing in another."

²De France v. Spencer, 2 Greene, (Iowa) 462; Calkins v. Barger, 44 Barb. 424; Stuart v. Hawley, 22 Barb. 619; Miller v. Martin, 11 Mo. 508; Averitt v. Murrill, 4 Jones' (N. C.) Law, 323; Clark v. Foote, 8 Johns. 421; Fahn v. Reichert, 8 Wis. 255; Hanlon v. Ingram, 3 Iowa, 81.

In most of these cases, the damage complained of resulted from fire spreading from burning stubble by defendant on his land, in a dry season, and the wind blew sparks thence to adjoining fields. The rulings were to the effect that burning of stubble, even at a very dry part of the year, and at the consequent risk of the fire spreading, was not sufficient negligence to charge defendant.

The circumstance that he who started a fire for legitimate purposes, upon his own land, did not keep constant watch of it, is not, alone, enough to establish culpable negligence. (Calkins v. Barger, 44 Barb. 424.) In this case, the defendant, in the early part of May, set fire to some log heaps on his land; the logs

his land, subject to the same general rule that he must use ordinary care to avoid spreading the fire upon the lands of others and there doing damage.¹

§ 55. Negligence, burden of proof of in case of fire.—

As to where lies the burden of proof of the exercise of ordinary care or negligence in case of fire, is to some extent an open

were old and damp, and were at a considerable distance from his house, and about a third of a mile from plaintiff's barn. The land where the fire was set was damp, near a swamp, and had been burned over the year before. The defendant lighted the fire and left it, and went away from home not to return for some hours, leaving it burning; the wind rose to a gale and blew the fire out from the log heap on to plaintiff's land, whence it spread to his barn and burned it. Held, that if defendant had no reason to apprehend that a gale would occur when he left home, he had a right to go away and leave the fire, and he should not be held responsible for the loss of the barn.

But in *Hanlon v. Ingram*, 1 Iowa, 108, the defendant set a fire on his own land to burn rubbish, and the fire spread to his neighbor's premises and there did damage; the Court charged the jury that defendant was liable only for *gross* negligence. This charge was held to be error; that the rule was that he who lights a fire must guard it with ordinary care, should take such precautions against its spread as would naturally characterize a prudent man in the ordinary care of his property.

So in *Garrett v. Freeman*, 5 Jones' (N. C.) Law, 78, defendant set fire to a log heap which was within five yards of a fence, and there was, lying around the place much loose dry wood and other combustible material, and there was also a dead, dry pine tree between the log pile and the fence; the weather was very dry and the wind rising; the pine tree caught fire, and fell across the fence, and set fire to plaintiff's property. The Court charged the jury that if there was no wind when the fire was started, the defendant could not be held for culpable negligence. On appeal, this instruction was held to be error, and judgment reversed.

"Every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads, and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant." (*Hewey v. Nourse*, 54 Me. 259.)

"But if a man engage in an act which the circumstances indicate may be dangerous to others, he must take all the care which prudence would suggest to avoid an injury." (*McGrew v. Stone*, 53 Penn. St. 436.)

¹The rule is given in *Hanlon v. Ingram*, 3 Iowa, 81, as follows: "All of the circumstances should be carefully weighed, and unless they disclose, with reasonable certainty, that, in setting out the fire, and preventing its escape, the defendant has used those precautionary measures which, as a prudent and cautious man, he would with reference to his own property, he should be held liable."

question ; whether he who caused the fire from which damage occurred must prove that he took due care to prevent its spread and take the affirmative of that proposition, or the plaintiff, who complains of the injury, must prove want of ordinary care. It is, however, now generally held to be the law, that the complaining party, as he must rely upon negligence, should upon that issue take the affirmative.¹

§ 56. Proximate damages alone recoverable.—In some of the States, it has been held that no one is liable for damage done to a neighbor's house by a fire which commenced on the land of the person complained against, and which, by his negligence, destroyed his own house, and spread through the air by a strong wind to houses not immediately adjoining. The damage is said to be too remote to afford a ground of action.

A distinction is claimed between the result of negligence, or the lack of due precaution, and an injury which results from malice or any active instrumentality of the party against whom damages are claimed ; but the decisions appear to have turned upon the proximate nature of the result to the cause, upon the principle that in determining accountability for the consequences of a wrongful act, or one culpably negligent, the immediate results, and not those which remotely occur, are to be regarded.²

This distinction appears to have had great weight in the minds of the judges, as it appears to have been generally conceded as law that, where the fire ran along a line of connected materials, such as dry grass, or forest trees, the person originally in fault

¹ *Turbervil v. Stamp*, 1 Salk. 13. In this case, it was held that, the injury being shown, and that it resulted from a fire which defendant had set out, he was put upon his defense, and must show that he had taken ordinary care to guard against the spread of the fire and damage to his neighbors ; but the converse of this was held in *Tourtellot v. Rosebrook*, 11 Met. 460, and in *Batchelder v. Heagan*, 18 Me. 32 ; that, in any case in which a person makes a fire on his own land, for a lawful purpose, and the fire spreads and does damage to another, the person who has suffered, and complains of the injury, must affirmatively allege and prove negligence, and that as the setting fire was a lawful act, it was, of itself, no evidence of negligence, which is the gravamen.

² "The negligently burning of a house, and the spreading of the fire to a neighboring house and the burning thereof, do not give the owner of the lost house a cause of action against the owner of the house in which the fire originated, because the damages are too remote." (*Ryan v. N. Y. C. R. R.* 35 N. Y. 210; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353.)

is held liable for the whole damage, on the ground that the damage is the immediate and proximate result.¹

But this distinction appears more nice than wise; it is difficult to see any just distinction between a fire which spreads and extends by running along the ground, or by continuous feeders in the shape of trees or dry grasses, and that where the wind causes its extension.²

§ 57. Statutes as to damages by fire.—In Connecticut, one who sets fire to land is, by statute, made liable for all the consequences of its spreading to and doing damage on the land of another;³ but this statute has been held to be confined to such damages as occur from a spread of the fire, and not to extend to the case of a stranger who sets fire on land to which he has no right of possession. Against such an one, the common-law rule furnishes the means of redress.⁴

In North Carolina, a man must not set fire on his own land without giving notice to his neighbor, in writing, of his inten-

¹ *Vaughn v. Menlove*, 32 Eng. Com. L. 613; *Vandenburgh v. Truax*, 4 Denio, 464; *Ryan v. N. Y. C. R. R.* 35 N. Y. 214. Opinion by Ch. J. DeGrey.

² *Illinois C. R. R. v. McClelland*, 42 Ill. 355, in which the sparks from a locomotive passed through the air, a long distance, and set fire; it appeared that the engine was not provided with best apparatus for arresting sparks; the company was held liable as for the injury, which was deemed the immediate and proximate result of negligence, notwithstanding the fact that the air was the medium through which the sparks passed.

Ryan v. N. Y. C. R. R. Co. 35 N. Y. 210, and *Penn. R. Co. v. Kerr*, 62 Penn. St. 363, are commented upon, and without substantial approval, in *Webb v. R. W. & O. R. R. Co.* 49 N. Y. 423 and 427-31. And in Massachusetts it has been distinctly held that a man who sets and keeps a fire on his own land negligently is liable for injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated. (*Higgins v. Dewey*, 107 Mass. 494.) In England, also, it has been held that there is no ground for distinction between cases where fire spread from running along the ground or by sparks driven by the wind through the air. The spread of the fire is equally the result of natural causes, and the distinction is held to be without merit. (*Fletcher v. Rylands*, Law Rep. 3 H. L. 330; *Smith v. S. R. R. Co.* Law Rep. 6 C. P. 14.)

³ Conn. Rev. St. p. 84, Sec. 365. "Every person who shall set fire on any land, that shall run upon the land of any other person, shall pay to the owner all the damage done by such fire."

⁴ *Grannis v. Cummings*, 25 Conn. 165, in which it was held that a fire started by a person who, for a specific purpose, had a license to use the land on which he set the fire, did not come within the provisions of the statute; but such a case is governed by the common-law rule.

tion so to do, of at least two days, that such neighbor may guard against damage.¹ The giving of the notice may be waived,² however, by the owner of the adjoining land; but, unless such notice is given or waived, he who sets fire on his own land is liable for damages which therefrom result to his neighbor.³

The rule in California is that treble damages are awarded against him who negligently sets fire to his own woods, or negligently suffers any fire to extend beyond his own land,⁴ and thereby his neighbor suffers loss.

In Illinois, no one is allowed to set fire, save between March and November, and only then for the purposes of self-protection from prairie fires; and where damage occurs from fire spreading, the burden of proof is on him who set the fire, to show that he did so to protect himself from prairie fires, and that he used all due precaution to prevent the spread of his fire.

§ 58. State laws as to damage by fire.—In Georgia, no one, not a resident of the county where the firing is done, and who owns land therein, is permitted to fire any woods, lands, or marshes, and even such resident and land-owner must do so only between the twentieth of February and first of April, annually, and by notifying in writing those persons whose lands adjoin the premises whereon he proposes to set fire; the notice must be given at least one day before setting the fire, and any persons who, either by themselves or agents, permit fire to get into the woods, lands, or marshes, through neglect, are to be deemed as setting fire, and within the provisions of the act.

The penalty for violation of this statute is a fine—or, as it is called, “forfeit”—of five hundred dollars, one-half of which goes to the informer, and the balance to the educational fund of the county. And he who suffers by the fire may also recover his damages.⁵

In Michigan, every person who shall willfully or negligently set fire to any woods, prairies, or grounds, not his own property,

¹ N. C. Rev. Code, 115, Chap. 16, Sec. 1.

² *Robertson v. Kirby*, 7 Jones' (N. C.) Law, 477.

³ *Averitt v. Murrell*, 4 Jones' (N. C.) Law, 322.

⁴ Political Code Cal. Sec. 3344.

⁵ Code of Georgia, 1873, Secs. 1456-9.

or shall willfully or negligently permit any fire to pass from his own woods, prairies, or grounds, to the injury or destruction of the property of any other person, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both fine and imprisonment, in the discretion of the Court; and shall also be liable to the party injured in double the amount of damages sustained.¹

The laws of Ohio make it an offense, punishable by fine not exceeding fifty dollars, for any one to willfully and maliciously set fire to "any woods, prairies, or other grounds," other than his own, or to "intentionally permit the fire to pass from his own prairie or grounds, to the injury of any other person or persons, and any person who may so offend is made" liable to an action of the party injured, for the damages which he, she, or they may have sustained in consequence of such fire.²

In the several criminal codes are to be found provisions making the firing of woods, prairies, and lands, or negligently allowing fires to spread from a person's own lands upon those of his neighbor, misdemeanor or crime, and as such imposing punishment by fine or imprisonment, or both.³

§ 59. A trespasser responsible for damage by fire.—A trespasser who sets fire to land is responsible for the damages which result, as the proximate consequences of his act, not only to the owner of the land on which the fire begins, but also to all other persons; and so of any one who either wrongfully or negligently sets fire to land which does not belong to or is not in his possession; he must respond for such damage as he has thereby caused.⁴ And even if a person be rightfully in the highway, traveling or driving stock, and he makes a fire upon or near the ground of another for a necessary purpose, but fails to take due precaution to guard against the fire spreading, he must answer for loss of property occasioned by the fire.

¹ Compiled Laws Mich. 1871, pp. 2143-4.

² Revised Stats. Ohio, Vol. 1, p. 432.

³ These statutes are, generally speaking, rather to be regarded as substantial affirmations of the common law than as abrogating it, and entire reliance upon the statutes would be unwise. (*Hewey v. Nourse*, 54 Mo. 258.)

⁴ *Finley v. Langston*, 12 Mo. 120.

§ 60. Liability of hunter or traveler for damage by fire.

—If a hunter or traveler negligently starts a fire upon wild lands or prairie, he is liable for all property destroyed by the flames. But as it is often necessary to kindle fires upon wild lands and upon prairies, fighting fire by fire is sometimes the only means at command for self-protection. The fact that fire was willfully kindled is not conclusive evidence to establish the liability of him who set it for damages which result from its spread; but the fact being established of a man's having set fire to land which was not his own, or in his possession, the burden of proof is upon him to show that he had good cause for so doing, and he must take the affirmative upon and establish that fact before he can avoid the liability; and he must also show that he used due care and diligence to prevent the spread of the fire.¹

§ 61. Damage by fire from steam-thresher.—The right to use such agencies as may occasion loss to another, or are dangerous, cannot be seriously questioned. There are no results which can be attained without some risk, and it would be as injudicious to question the right to use horses to haul produce to market, because they might run away and cause injury, as to call in question the right to employ steam-engines to work threshers. Neither can any precise rule of care in the use of

¹ *Clelland v. Thornton*, 43 Cal. 437. This was an action for damages. The complaint was that the defendant, while driving a herd of sheep through the country, encamped near plaintiff's premises, and carelessly left fires burning, which, after defendant's departure, got out and spread to plaintiff's land, and there destroyed his buildings and other property. Held, that where a party makes a fire for necessary purposes, upon or near the grounds of another, and negligently leaves it, with combustible material about it, and the fire spreads and destroys adjacent property, the party building the fire is liable for the damage done.

The rule is thus laid down in the latest standard work on negligence: "*When fire is lawful, burden on plaintiff to prove negligence; but otherwise with unlawful fires.* Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held, in this country, that one building a fire upon his own premises can be made liable, if it escapes upon his neighbor's premises and does him damage, without proof of negligence. But the rule is otherwise when the fire is unlawful, in which case the burden is on the defendant, after proof of the unlawfulness, to defend himself by proving *casus*. Eminently is this the case with fire started on prairies, or other wild lands, where the devastation is likely to be so terrible." (*Wharton on Negligence*, Sec. 867.)

such engines be prescribed, and there have been no instances in which the limit of approach toward straw stacks, fences, or buildings have been fixed at which such engines could be worked.

Steam being generated by heat, and there being no known means of producing combustion without a draught of air, which carries off sparks from the fuel, the emission of sparks from the smoke-stack of a steam-thresher is not of itself illegal. The law, in conferring the right to use an element of danger, protects the person using it, except for an abuse of his privilege. But, in proportion to the danger to others, will arise the degree of caution and care he must use who exercises the privilege. Great danger demands higher vigilance and more efficient means to secure safety; where the peril is small, less diligence will suffice.

It is undoubtedly the duty of him who operates an engine in a dry grain field, where his machine is surrounded by combustible matter, to use the utmost possible vigilance and foresight to avoid fire getting out and consuming property of value.

The use of the steam-thresher and similar *agricultural implements*¹ symbolize enterprise and attest the march of civilization; and invoking, as we must, to their appreciation the talent and understanding in which they had their origin, we should subject those who use such implements to an appreciation of the appliances for safety which a coeval employment of ingenuity and talent have placed at their command. It is, therefore, the duty of those who use these hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves, from time to time, of every approved invention to lessen their danger to others.²

¹ As to the precise meaning to be attached to such descriptive terms as "agricultural implements," some doubt might be entertained as to whether a steam-thresher could properly be classed in that category; but in the English statutes, 14 and 15 Vic. Chap. 38, Sec. 4, and 3 Geo. IV, Chap. 126, Sec. 36, it was enacted that the words *implements of husbandry* should be deemed to include *threshing machines*, and in *Regina v. Matty*, 27 L. J. (N. S.) Q. B. 223, the steam-engine which pertained to a steam-thresher was held to be an *implement of husbandry* within the meaning of the statutes mentioned, so as to render it exempt from payment of toll.

² *Tally v. Ayers*, 3 Sneed, (Tenn.) 677; *Shearman & Redfield on Negligence*, Sec. 322; *Brand v. Hammersmith R. Co.* Law Rep. 4, H.L. 171; *Rood v. N. Y. &*

§ 62. Evidence of negligence in use of steam-thresher.

—These principles are abundantly supported by authorities, and are founded upon justice, but difficulties may arise in their practical application. Questions of skill, vigilance, care, and proper management in the business of running such machines, may become matter of controversy, as they may, for that matter, in any business, and such questions so entirely depend upon the circumstances of individual cases that no general rule can be given. All of this class of questions must be submitted to the jury, to determine from the circumstances what was due care, and whether or not it had been exercised. The solution of these questions depends upon the facts of each case. What is care in one case may be negligence in another, where the danger is greater and more care is required. The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable that such care must be required which it is shown is ordinarily sufficient, under similar circumstances, to avoid the danger and secure the safety needed. Ordinary care is, therefore, the only rule which can be stated as that for a lack of which the proprietor of a steam-thresher can be made liable in damages. But, as the degree of care is measured in every case, or class of cases, by the surrounding circumstances, that which is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and that which would be ordinary care in a case of ordinary danger would be less than ordinary care in a case of great danger. Hence, as the nearest possible approach to a general rule, it results that those who avail themselves of these improvements and labor-saving machines, which, for their primal motor, must rely upon so dangerous an element as fire, should be held, as a rule of ordinary care, to the employment of constant vigilance, and the use of the most approved meth-

E. R. R. 18 Barb. 80; McCready v. S. C. R. R. 2 Strobb. Law, 356; Vaughn v. T. R. R. 5 Hurlst. & N. 679; Reading v. Yeiser, 8 Penn. St. 366; Frankford v. P. & T. R. R. 54 Penn. St. 345; I. C. R. R. v. Mills, 42 Ill. 407. The owner of a steam-thresher cannot be held responsible for injuries arising through the negligent use or management of his property by one who has placed himself in such position that as to him the owner owes no duty. (Keefe v. R. R. Co. Sup. Ct. Minn. January, 1875.)

ods for, and appliances to be used in, guarding against the escape of fire.¹

§ 63. Proprietor of steam-thresher must use appliances to avoid escape of fire.—The necessity of using particular appliances to prevent escape of fire is a question of fact for the jury; and where the testimony as to the value of particular improvements is conflicting, the question of whether or not the party who runs the machine should avail himself of it in order to exercise due care, has been held to be a question for the jury to pass upon as one of fact.² And if such appliances as experience has shown to be beneficial are upon the machine, the one who runs the engine must, at his peril, see that they are kept in use, and whether he has done so or not is especially for the jury to determine.³

¹ "A person who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary ones." (*Blyth v. B. W. Co.* 2 Jur. N. S. 333; 11 Exch. 781; 25 L. J. Exch. 212.)

The general rule is that, being authorized to so use fire to make steam, the owner of the machine is not liable unless he exercise the right carelessly. Accidents may, however, be of such a nature that negligence may be presumed from the mere fact of the accident. (*Byrne v. Boodle*, 33 L. J. Exch. 13; 9 L. J. N. S. 450; 2 H. & C. 722; 12 W. R. 279.) And if all the usual or needful appliances to prevent the escape of fire are used, and all due precaution exercised, still the owner of the machine is liable if the fire occur by reason of his so overcrowding his engine as to render inoperative the appliances used to prevent the escape of sparks, and by reason of such conduct the fire is set. (*Hyett v. Reading R. R. Co.* 23 Penn. St. 373; *Jackson v. Chicago Etc. R. R.* 31 Iowa, 176; *Toledo R. R. v. Pindar*, 53 Ill. 447.) The owner of the machine, however, is not to be held liable when a fire occurs, nor does a presumption of negligence arise because he had not on his machine the latest invention to prevent escape of fire. It might well occur that many inventions are of little or no value, and the person who used them might in so doing depart from usual and better precautions in relying upon a new plan or appliance. But if it appear that an invention had come into general use, and had been found to be a means of avoiding the danger, and been generally approved of by those who made use of it, the owner of the machine ought to employ the agency at his command to avoid danger, and he neglects to do so at his peril. (*Shearman & Redfield on Negligence*, Sec. 332; *Frankford v. P. & T. R. R.* 54 Penn. St. 345.)

"Ordinary diligence is no fixed and unalterable standard of care: it is always to be determined by the facts and circumstances of each case; and when the circumstances are such as to indicate increased peril, it would require greater watchfulness to constitute ordinary care than under circumstances of less peril." (*Murphy v. R. R. Co.* 38 Iowa, 539.)

² *Freemontile v. L. & N. R. R.* 10 C. B. (N. S.) 89; *Jackson v. C. R. R.* 31 Iowa, 176; *Dimmock v. N. S. R. R.* 4 Fost. & F. 1058.

³ *Anderson v. Cape Fear Steamboat Co.* 64 N. C. 369; *Bolke v. C. R. R. Co.* 26 Wis. 537.

Of course, it is for him who complains of the injury to satisfy the jury that the fire originated from the threshing engine; but, the origin of the fire being proved, it would seem that sufficient had been shown to put upon the defendant the burden of proof of exercise of ordinary care under the circumstances of the case, and so it has been held;¹ but in other Courts it has been held that plaintiff must take the affirmative and show what precautions defendant might and ought to have taken, but did not.² At all events, the plaintiff may safely rest when he has shown that the fire occurred by sparks escaping from the engine, and that other engines are in common use, so constructed and run that sparks from them do not escape, and that the particular engine did not retain its sparks as others in common use did; and having made such a showing, the defendant would be put upon his proofs that his engine, was properly constructed, with the common appliances in use to guard against fire, and that it had been operated and guarded in such a manner as a man of ordinary prudence and intelligence, under the circumstances, would exercise in guarding his own property of a like character from injury.³

§ 64. Proprietor of steam-thresher not an insurer.—Notwithstanding the rule that he who employs in his business an element of danger must be held to strict care, and the use of all available means and appliances to avoid doing injury to others, his responsibility should not be so far extended as to deprive him of the right to make use of such machines as steam-threshers, so long as he does so in such manner as to maintain the proper balance between danger and benefit to the public.

There are no circumstances in life which are free from danger, and a member of the body politic can hardly so conduct his business as that a possibility of injury to others may not result therefrom; but it would manifestly be wrong to therefore pre-

¹ *Sheldon v. Hudson R. R.* 29 Barb. 226; *Bass v. Chicago R. R.* 28 Ill. 9; *Illinois C. R. R. v. Mills*, 42 Ill. 407; *Piggott v. Eastern R. R.* 3 C. B. 229; *Fitch v. Pacific R. R.* 45 Mo. 322.

² *Hull v. Sacramento R. R. Co.* 14 Cal. 387; *Gandy v. C. R. R. Co.* 30 Iowa, 419.

³ *Field v. N. Y. C. R. R.* 32 N. Y. 339. It is negligence to run an engine after it has been found to scatter sparks. (*C. & G. R. R. v. Cleveland*, 42 Vt. 449.) And so it is to open the gates and let out upon the dry ground coal and cinders. (*Martin v. Weston R. R.* 23 Wis. 437.)

vent individuals from acting at all, and the same right which the citizen has to use fire for household purposes exists in his favor to use the same element as a labor power in machines such as those indicated, subject, however, to such duty as to care and providence as common prudence dictates. And, indeed, to limit the use, or extend the liability further, would go very far toward rendering the possession of property rather to be avoided than desired, and would tend to discourage any attempt to utilize the power of the elements, because of the danger involved.

The proprietor and manager of machines, in themselves dangerous, takes upon himself grave risks, hazards his life and capital, and the public has an interest in his protection from extraordinary responsibilities. All that can reasonably be expected of any owner is so to manage and use his property as carefully to avoid any injury to the property or rights of others, and no one can have any ground upon which to base a complaint of such use and management, unless thereby he can show himself to have been injured in his property or his rights.¹

§ 65. Common-law rule as to liability for fires caused by locomotives.—The general rule from the English authorities, where loss has occurred by fire resulting from sparks dropped by a passing locomotive, has been that the fact of the fire occurring in such manner was *prima facie* evidence of negligence on the part of the company, and that to avoid liability they must show that they had availed themselves of the best appliances in use, and had exercised due care to prevent the accident.²

¹ *Keefe v. B. R. Co.* Sup. Court, Minn. Jan'y, 1875; *Whirly v. Whitman*, 1 Head, 610; *Lynch v. Newdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507.

² Such, at all events, appear to be the principles of the earlier cases. *Piggott v. Eastern Counties R. Co.* 3 C. B. 229.—This case, decided in 1846, has since been so often quoted and commented upon in England and America as to have acquired in both countries an especial value. The language of the opinion, by Tindal, C. J., is: "The defendants are a company intrusted by the legislature with an agent, of an extremely dangerous and unruly character, for their own private and particular advantage; and the law requires of them that they shall, in the exercise of the rights and powers so conferred on them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence, in this case, was abundantly sufficient to show that the injury of which the plaintiff complains

The subject has been discussed at considerable length in the more recent English cases, and in them the general principles have been recognized that the mere fact of the company using fire as a means of locomotion, from which occasional fires will be communicated to property near the line of the road, makes the companies responsible for the damages caused thereby, and that they were so liable, where unable to show that all available means had been exhausted and all proper appliances used to prevent the occurrence of such accidents. In one case, the rule was carried so far as to declare that the company, availing itself of means of locomotion of such a character as necessarily to incur great risk of doing damage to others, must be deemed to have accepted the risk and assumed the liability.¹ But, in the Exchequer Chamber, the rule has been so far modified as to admit that, the legislature having legalized this mode of locomotion, the companies could not be held liable without proof of some degree of neglect.²

§ 66. American rule as to fires from locomotives.—In the United States, railroad companies have been more favored

was caused by the emission of sparks or particles of ignited coke coming from one of the defendant's engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of *Mitchel v. Alostree*, 1 Vent. 205, for an injury resulting to the plaintiff from the defendant's riding an unruly horse; that of *Bayntine v. Sharp*, 1 Lutw. 90, for permitting a mad bull to be at large; and that of *Smith v. Pelah*, 3 Stra. 1264, for allowing a dog, known to be accustomed to bite, to go unmuzzled. The precautions suggested by the witnesses, called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of *Beauleau v. Fingham*, in the Year Books, p. 2, H. IV, fol. 18, pl. 5, comes near to this. There the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was, '*quare cum secundum legem et consuetudinem regni nostri Anglia hactenus obtentam, quod quilibet de eodem regno ignem suum salvo et secure custodiat, et custodias, teneatur, ne per ignem suum damnum aliquod vicinis suis coeniat.*'" Although in *Aldridge v. G. W. R. Co.* 3 M. & G. 515, where a loss was shown to have occurred by fire set by sparks falling from an ordinary engine, run in an ordinary manner, it was held that the facts did not necessarily show either negligence or no negligence; that the fact should be left to the jury.

¹ *Vaughn v. Taffvale Railw.* 3 H. & N. 743.

² *Ibid*; *S. C.* in *Exchequer Chan.* 5 H. & N. 674; *King v. Pease*, 4 B. & Ad. 30.

than in England, and the rule of their liability, for damage done by fires caused by sparks from locomotives, is much more advantageous to the companies than it has been in the mother country. The reason of this difference is probably in the comparatively high value of money in America, and the consequent difficulty of inducing the owners of capital to employ it upon works of the magnitude of the construction and equipment of railroads, but in the creation and working of which the public is so far interested as to induce applications of the law as favorable to the companies as is compatible with safety to the public.

From whatever cause it may result, the difference is manifest, and in this country it seems to have been assumed that the business of railways, on which steam locomotives are used, being lawful, no presumption of negligence arises from the fact that sparks from the engines set fire to adjacent property.¹ And from a majority of the later cases it appears that to entitle a plaintiff to recover of a railroad company damages on account of fire resulting from sparks emitted from one of its engines, the negligence of the company in the premises must be shown, either directly or by circumstances tending to establish it; such as the absence or imperfect condition of a spark-arrester, the excessive amount of steam, an unlawful rate of speed, or the like. The mere fact that the fire was occasioned by the

¹ *Rood v. N. Y. & E. R. R.* 18 Barb. 80; *Lyman v. Boston & W. Railway*, 454; *Commonwealth v. Metropolitan R. R. Co.* 107 Mass. 236.

In some of the States the statutes specially provide as to where shall lie the burden of proof of negligence in such cases; but these statutes are, and the ruling on them, exceptional; as, for instance, *Baltimore Etc. R. R. Co. v. Dorsey*, 37 Md. 19. "Maryland Code, Art. 77, Sec. 1—making railroad companies responsible for injuries by fire from locomotives—construed to include a case of fire from cinders thrown from the engine by the company's servant in charge, and to lay upon the company the burden of disproving negligence." So in *Chicago v. Quintance*, 58 Ill. 389: "Under the Illinois Act of 1869—making the fact that an injury has been occasioned from sparks emitted from a locomotive while passing along the road, full prima facie evidence of negligence on the part of the company—it is no rebuttal to show that the engine was originally constructed with the best and most improved invention to prevent the escape of sparks. The law imposes the duty of constant vigilance to keep in repair."

Under such a statute in Massachusetts, where the sparks from the engine communicated fire to a shop, and the wind drove the sparks from the shop sixty feet across the street, and set fire to a house, it was held that this second fire must be regarded as "communicated" by the company's engine, within the statute. (*Hart v. Western Railway*, 13 Met. 99; and see also *Fitchburg R. R. Co. v. Charlestown Mutual Ins. Co.* 7 Gray, 64.)

sparks does not make a *prima facie* case against the company.¹ But in some of the State Courts it has been held that when the origin of the fire has been shown to be from sparks dropped by a locomotive, the railroad company must show that they used all necessary precautions to avoid doing such mischief.²

§ 67. **Special laws as to fire from locomotives** vary the general rule in some of the States, and conform to the principles of the English law, by holding the companies to the proposition that, in accepting the use of an agency so dangerous as a locomotive, they must be deemed as accepting all losses which may occur by fire from sparks falling from their engines, unless they can show due care in guarding against the danger, in some instances the State laws go even further, and, as in Massachusetts, make the railway companies liable for all damage done in this way. It has, however, been held that such statutory liability only extends to property of a permanent nature, and upon which an insurance may be effected; and that for injuries of this kind to other property the company can only be held liable where there has been on their part negligence, unskillfulness, or imprudence in running and conducting their engines.³

¹ *Gandy v. Chicago R. R. Co.* 30 Iowa, 420; 1 Redfield on Railways, 453. "It seems to have been assumed, in this country, that, the business of railways being lawful, no presumption of negligence arises from the fact of fire being communicated by their engines." It is to be observed that a tendency to establish a standard of care on the part of the railroad companies, less high than that which has generally been esteemed just, is becoming manifest in some of the Courts, and markedly in those of the State of New York. Indirectly, the power of great corporations manifests itself by the ability of learned counsel which it can command, and the influence of arguments which such counsel can bring to bear upon the Courts; it is, however, to be hoped that such effects are to be but temporary, and that the safer rules will be found to be those advocated by the leading law journals, holding the companies to such reasonable care as the nature of their business makes requisite, to guard the community from danger. (*McGrath v. N. Y. C. & R. R. Co.* 59 N. Y. 468; *Albany L. J.* Jan. 15th, 1876, p. 36.)

² *Bass v. Chicago R. R. Co.* 28 Ill. 9; *I. C. R. R. Co. v. Mills*, 42 Ill. 407; *Fitch v. Pacific R. R. Co.* 45 Mo. 322; *Bedford v. Hanibal R. R. Co.* 46 Mo. 456; *Spaulding v. Chicago R. R. Co.* 30 Wis. 110; *Case v. Northern Central R. R. Co.* 59 Barb. 644.

³ *Chapman v. Atlantic & S. L. R. R. Co.* 37 Me. 92, which was an action for damages by fire, caused by sparks from a passing locomotive to a lot of posts piled up near the railroad, upon a permission to put them there by the owner of the land. It was held that the company was not liable, under the statute, for loss of such property, and that plaintiff, to recover, must show negligence.

But growing trees, orchards, and all other property which is attached to the soil, or is a part of the realty, or is of such a character as to be permanently upon the premises, in such manner as that the company may fairly be presumed to have known that it might be exposed to injury by fire from their engines, when they accepted their charter or built the road, are within the provisions of such statutes, and the owners of such property may, in this connection, regard the railroad company as a special insurer to the extent prescribed.¹

§ 68. State laws as to fires caused by locomotives.—

The statute of New Hampshire is of such a character, and makes the company liable for all damages which may accrue to any person or property by fire or steam from any locomotive, or other engine, on a railroad;² and the liability of the proprietors of a railroad, under this statute, for injuries caused by its operation, extends to all persons who may come within its influence.³

So, in Maryland, the code provides that a railroad company shall be responsible for injuries by fire occasioned by its engines, or carriages, upon its road, unless the company can prove, to the satisfaction of the Court, that the injury complained of was committed without any negligence on the part of the company

¹ *Pratt v. H. & St. L. R. R. Co.* 42 Me. 579. The statute under which this action was brought made provision that "when injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured." (Stats. of Maine, 1842, Chap. 9, Sec. 5.) But that this liability might not be too onerous on the company, the same section provides that the railroad corporation should have an insurable interest in the property. The action was for the recovery of damages done to growing timber on the plaintiff's land, by fire from the defendants' engine, distant almost three hundred feet from the line of the railroad, communicated to materials growing and naturally lying on the land between the plaintiff's premises and the railroad track, and thence spreading to the land of the plaintiff. The defendants relied upon *Chapman v. At. & St. L. R. R. Co.* 37 Me. 92, above cited. In this case, commenting on *Chapman v. At. & St. L. R. R. Co.* the Court says: "The analogy between the cedar posts deposited some few rods from the railroad, and growing trees, is not strong. The former being considered, in the case cited, as movable property, having no permanent location, but from its nature left for the purpose of being put in some other place within a short time, was not insurable property, so that it would be understood as falling within the purview of the statute."

² Sec. 8, Chap. 148, General Stats. N. H.

³ *Price v. Concord R. R. Co.* 51 N. H. 591.

or its agents;¹ and in that State it has also been held that the law applies alike to cases where the party complaining suffers loss directly from the engine itself, by sparks escaping through the smoke-stack, or from coals or cinders thrown from the engine or fire-box by the servants of the company.² If the party injured establishes, by sufficient proof, the fact that the fire originated from the fire in the locomotive, and that he has suffered damage thereby, then the onus is cast upon the company of proving that such damage was not the result of carelessness or negligence on the part of the employees of the company.

§ 69. Value of common-law rule in America.—From these laws above mentioned, and similar statutory enactments, it would appear that the necessity of the rule which has been recognized in England is, to some extent, manifest in America, and has been there, also, regarded in the provisions inserted in the law to impose upon the railroad companies the taking of such precautions as would, to the greatest possible extent, prevent the occurrence of loss so great as is liable to result from the spread of fire.

Beyond the individual injury to him whose property is immediately affected by the danger of fire by passing locomotives, the public is liable to great loss from conflagrations originating from the use of so dangerous an element as steam on roads, and it is not wholly apparent that the American invasions of the common-law rule have been judicious.³

¹ Art. 77, Sec. 1, Code of General Laws of Maryland.

² *Baltimore & O. R. R. Co. v. Dorsey*, 37 Md. 24; *Woodruff's Case*, 4 Md. 242; *Lamborn's Case*, 12 Md. 257.

³ *Grand Trunk R. R. Co. v. Richardson*, U. S. Sup. Court, January, 1876. "The plaintiffs were allowed to prove that, at various times during the season, before the fire occurred, some of the defendant's locomotives scattered fire while passing, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in make, state of repair, or management, to those claimed to have caused the fire. Held, that the evidence was admissible."

This case was from Vermont, under a statute providing that in case of fire communicated by locomotives the company should be responsible, unless it showed due care.

In Massachusetts, under a similar statute, it was held that the company was responsible for all negligent injuries so communicated, whether proximate or remote. (*Hart v. R. R. Co.* 13 Met. 99; *Albany L. J.* Feb. 5th, 1876, p. 89.)

Redfield on Railways, Vol. 1, p. 456. "We cannot forbear to add that the in-

§ 70. Burden of proof of negligence.—The question whether negligence as to the construction and management of a locomotive, is to be implied from the fact of fire having escaped from it, by which property is destroyed, so as to cast the burden upon the company of showing that it was properly constructed and properly managed, is one with respect to which there seems to be a clear and decided conflict of authority. The rule of the English Courts, and that of many of the American States, is that the burden of proof rests upon the company when property is thus shown to have been destroyed.¹

And upon the converse of the proposition it has been contended that the statute of 6 Anne, Chap. 3, Sec. 6, enacted in 1807,² providing that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin, and the statute of 14 Geo. III, Chap. 78, Sec. 86, which ordains that "no action, suit, or process whatever, shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall, after the 24th day of June, 1784, accidentally begin, nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding," were adopted by the several States as a part of the common law, and that at least the burden of

interference of the legislatures upon this subject in many of the American States" (making the companies liable, and throwing on them the onus of showing absence of carelessness, etc.) "seems to us an indication of the public sense, in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injury occurring. There seems to us both justice and policy in the English rule on the subject."

¹ *Albridge v. G. W. R. Co.* 3 Man. & Gr. 515 (42 E. C. L. R. 272); *Piggott v. Eastern Counties R. Co.* 3 Man. Gr. & Scott, 229 (54 E. C. L. R. 228); *Gibson v. Southeastern R. Co.* 1 Foster & Finl. 23; *Ellis v. P. & R. R. Co.* 2 Ird. Law, 123; *Herring v. W. & R. R. Co.* 10 Id. 402; *Hugett v. P. & R. R. Co.* 23 Penn. St. 373; *Hull v. S. V. R. R. Co.* 14 Cal. 387; *Bass v. C. B. & Q. R. R. Co.* 28 Ill. 9; *Ill. C. R. R. Co. v. Mills*, 42 Ill. 407; *McGready v. R. W. Co.* 2 Strobb. Law, 366; *Cleveland v. G. T. R. R. Co.* 42 Vt. 449; *B. & L. R. R. v. Woodruff*, 4 Md. 243; *Spaulding v. Ch. & N. W. R. R. Co.* 33 Wis. 582.

"The fact that damage was caused by fire escaping from a locomotive engine creates a *presumption* that the engine was defective in construction or condition, which throws upon the railroad company the burden of proving the contrary. Such presumption is, however, but a presumption of law; and it is for the Court, not the jury, to determine the amount and character of the proof necessary to overcome it." This case was decided in 1873, with all the older decisions considered upon full argument, the case being in the Supreme Court for the second time.

² 1 Bl. Com. 431.

proof of negligence was upon the plaintiff; that defendant being engaged in a legitimate business, the conduct of which required the use of fire in such manner as that some danger of setting fire was necessarily incurred, the plaintiff must show negligence in the construction or management of defendant's engine, and that the fact that fire gets out from the locomotive does not make a *prima facie* case of negligence against the company.¹

§ 71. Duty of railroad company to guard against fire.

—But whatever may be the rule, if there is one applicable, as to burden of proof, the law is such that railroad companies, in the construction of their engines, are bound not only to employ all due care and skill for the prevention of mischief arising to

¹ R. R. Co. v. Yeiser, 8 Barr. (Penn.) 366; Turnpike Co. v. R. R. Co. 54 Penn. St. 349; Lansing v. Stone, 37 Barb. 18; Burroughs v. R. R. Co. 15 Conn. 124; Paramore v. R. R. Co. 31 Ind. 145; Rood v. R. R. Co. 18 Barb. 80; Sheldon v. R. R. Co. 4 Kern. 224; Opinion by Hubbard, J.; Field v. R. R. Co. 32 N. Y. 349; Smith v. R. R. Co. 37 Mo. 294, in which the proposition was most strongly stated, and it was held that "in an action for damages against a railroad for negligently managing its engines, so that fire was communicated to the standing crop and grass of plaintiff, the burden of proof is upon the plaintiff to show that the fire was caused by the negligence or want of care of the defendant. There is no legal presumption of negligence in such cases—it must be shown as a matter of fact."

These cases are decided upon the application of the general principle that the use of locomotives is lawful; that an action does not lie for a reasonable exercise of one's right, though it be to the injury of another (P. & R. R. Co. v. Yeiser, 2 Am. R. R. Cases, 325; Burroughs v. N. R. R. Co. 2 Am. R. R. Cas. 30; Rood v. N. Y. & E. R. R. Co. 18 Barb. 80); and that a railroad company, being in the lawful use of appliances to carry on its business, to which is necessarily incident a risk of setting fire, the plaintiff against the company must take the affirmative upon the issue of negligence. (Indianapolis Etc. R. R. Co. v. Paramore, 31 Ind. 143; P. & R. R. Co. v. Yeager, 73 Penn. St. 121.) "A party is not answerable in damage for the reasonable exercise of a right, unless upon proof of negligence, unskillfulness, or malice. Buildings were burned by sparks from a locomotive used in the ordinary way upon a railroad; in a suit by the owner against the company, held, there being no evidence to justify an inference of negligence, that the jury should have been instructed to find for defendant." Rood v. N. Y. & E. R. R. Co. 18 Barb. 87, in which it was held that authority to run a steam-engine is an authority to emit sparks therefrom. So in Garrett v. N. W. R. Co. 36 Iowa, 121, it was held that the mere fact that fire was caused by sparks from a locomotive does not establish a *prima facie* case of negligence against the company, but that, as in the nature of the case, the plaintiff must labor under difficulties in making proof of negligence, it may be established by circumstances bearing more or less directly on the case, which might not be satisfactory in other cases free from such difficulties and open to clearer proofs.

the property of others by the emission of sparks, or any other cause, but they are also bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided they are such as, under the circumstances, it is reasonable to require the companies to adopt;¹ and if fires occur by sparks from a locomotive, the company must be prepared to show that the engine was properly provided with such appliances. The reasons given for requiring the companies to show that this duty has been performed on their part, and that the agents and employees of the road know, or at least are bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and cannot be obtained by them without great trouble and expense, and then often as a favor from the com-

¹ *Dimmock et al. v. N. S. R. R. Co.* 4 Foster & Finlason, 1064. The rule in the English Courts is thus stated: The company, in the construction of its engines, must take all due care, and avail itself of all the appliances which science has put within its reach, provided it is, under the circumstances, reasonable to require them to adopt; and the test is the comparative degree of the risk on the one hand, and the expense or practical inconvenience on the other. It is for the jury to draw the line, and if, in the case before them, the jury find that there were precautions which, under the circumstances, it would have been reasonable to require the company to adopt, then the non-adoption of these precautions would be negligence on their part. With reference to that question the jury should consider the evidence of the scientific and practical witnesses, on one side and the other, and decide the proposition by the preponderance, and especially as to the practical value of the appliances which it is claimed the company ought to have adopted.

In the American Courts this decision is quoted, approved, and made the basis of the rule as to employment of appliances to prevent escape of sparks so as to cause damage by fire to property. (*Spaulding v. C. Etc. R. R. Co.* 30 Wis. 110; *Bedell v. L. I. R. R. Co.* 44 N. Y. 367; *Cleveland v. Grand Trunk R. R. Co.* 42 Vt. 449.) The rule is given in *Shearman & Redfield on Negligence*, Sec. 322. A railroad, authorized to use steam power, "has necessarily the right to use fire as a means of generating steam, and is not liable for injuries by sparks or coals escaping from its locomotives, if it has adopted every known precaution against such accidents; though it will be liable therefor if such precautions be not adopted. It is not meant by this that the company will be thus liable, on simple proof that an invention was in existence, by the use of which the injury might have been prevented. It must appear that, before the time of the injury, the invention had come into common use, and had been approved by experience."

pany, which, under the circumstances, the company would be very likely to withhold. So, also, it would seem that the duty is imposed upon the company of so keeping its road-bed, and lands immediately adjoining, free from such inflammable material as would, in conjunction with the use upon the engine of an element so generally dangerous as fire, create a special risk to those who had property in the vicinity. It will not be a sufficient defense to an action against a railroad company for damage by fire from its locomotive alone, to show that the engine was properly constructed and run, if it appear that the lands of the company through which the road runs, or the road-bed itself, are so covered with dry grass, forest leaves, or other inflammable substances, to such an extent as to render the danger of fire on that account peculiar, it being made to appear that the conflagration was caused by sparks falling upon such inflammable substances.¹

¹ Where the company permits dry grass to remain on the strip of land between the track and the fence, and the dry grass, being there, constitutes a means of fire from the engine, extending to and injuring property; the fact of the grass so being permitted to remain is one proper for the jury to consider in an action against the company for damages resulting from the fire. If the dry herbage was permitted to remain standing in such quantities as shows negligence, evidence of that fact would ordinarily be admissible. (*Henry v. S. P. R. R. Co. Sup. Ct. Cal. August 2, 1875*; *Sill v. Reese*, 47 Cal. 341; *Flinn v. R. R. Co.* 40 Cal. 11.)

Spaulding v. C. & N. R. R. Co. 30 Wis. 123. On the trial of this cause the following instruction was asked: "The defendant was not bound to burn the dry vegetation on any portion of its way, when, by reason of the direction or force of the wind, or other attendant circumstances, it would endanger its own property, or the property of others, so to do." This request was refused, and, on appeal, the Supreme Court said: "It seems to have been taken for granted, on the trial below and in this Court, that the only, or the most practicable and usual method resorted to by railroad companies to remove the dry grass or other inflammable materials, such as forest leaves, etc., accumulating on the right of way, is, under the supervision of workmen, to burn them on the way, on either side of the track, to the fences or boundaries of the company's land on either side. To carry on this operation with safety, many things must be taken into account, and especially the course of the wind, when that is blowing; the fire must be set to windward of the track, which will interrupt its passage, and not be taken in the direction of the adjoining fields on the side where set, from which mischief and the destruction of property might ensue. There was some evidence, and enough, we think, to have carried the question to the jury, whether the failure of the company to remove, in this way, the dry grass and leaves from the place where the fire was shown to have been communicated, was or was not negligence, or an omission of duty on its part, for which it should be held to respond in damages to the plaintiff in this action. The duty of removing such inflammable materials from the way owned by the company, implies, as of course, that the company is to have reasonable time and opportunity for that

§ 72. Care required in running locomotive.—From the principles involved, it necessarily results that the company must not only keep its engines properly equipped with all available appliances to prevent damage by fires from sparks, but must also compel employees to such management and control of the fires on the locomotives as are most conducive to safety in the use of the dangerous element used for making motive power. For any carelessness by the company's employees in using the fire, cleaning the grates, emptying cinders from the engine, or otherwise, the company must be held answerable for any damage to property which may result.¹

And even without such carelessness, the company may be

purpose, if the accumulation of such materials be unavoidable, or if not suffered or caused by the neglect of the company.

"The testimony fails to show that there was any other fit or feasible means of removing the combustible materials than by burning, to which the company should have resorted when that method became impracticable. The testimony does not clearly show that no reasonable opportunity had been presented for burning at that place, but it tends to show that, and, at the same time, to show that it was a place more than ordinarily exposed to danger from fire, and which on that account should have received the earliest attention practicable on the part of the workmen and servants of the company. On the whole, we are of the opinion that the testimony was such that it should have been submitted to the jury to say whether there was any negligence on the part of the company in this particular or not, and that the instruction under consideration should, for this reason, have been given." (*Bass v. C. B. & Q. R. R. Co.* 28 Ill. 17.) "And we hold, also, that it is negligence in a railroad company to suffer dry grass or rubbish to be on their right of way."

¹ Where running in a place of peculiar exposure to fire, extra diligence is required of a railroad. (*Fero v. B. & S. L. R. R. Co.* 22 N. Y. 209; *Rood v. N. Y. & E. R. R. Co.* 18 Barb. 80; *Field v. N. Y. C. R. R. Co.* 32 N. Y. 339.)

Evidence of dropping coals on the track, and thereby causing fires, is proper for the jury. (*Sheldon v. H. R. R. Co.* 14 N. Y. 218; *Hinds v. Barton*, 25 N. Y. 544; *Field v. R. R. Co.* 32 N. Y. 339.)

"At a time of continued and extreme drouth, while a strong wind was blowing from the land of the defendant toward the adjoining woodland of plaintiff, coals were negligently dropped from one of defendant's engines, which set fire to a tie. The fire was communicated to an accumulation of weeds and grass and rubbish which defendant had suffered to gather by the side of its track; thence it spread to the fence, and on to plaintiff's woodland, burning and destroying his trees, etc. In an action for the damages, held that the questions as to whether the injury was a probable consequence of the negligent acts and omissions, were properly submitted to the jury, and that the evidence was sufficient to sustain a verdict for plaintiff. Also held that the question of negligence did not consist merely in suffering the coals to drop from the engine; but that that, together with the dryness of the atmosphere and earth, the strength and direction of the wind, the permitted accumulation of weeds, rubbish, and grass, were all constituents of the act, and went together to make it negligent."

held responsible for damages from fire caused by sparks from locomotives, if it appear that the engine was being overworked to such an extent as to render futile the precautions usually employed to guard against the escape of sparks by appliances ordinarily sufficient to guard against that danger.

It has come to be a recognized fact that when trains are run at a high rate of speed, by brisk fires in the engines being maintained, the danger from the escape of sparks is correspondingly increased. It is not law, therefore, that trains should not be run rapidly; but, from the premises, it does result that the liability of the company for damages caused by fires from the engine is made greater in proportion to the increase of danger, and the precautions used must also be correspondingly increased.¹

§ 73. Fires must be extinguished when discovered—

If a fire be set by sparks from a locomotive, and the employees of the railroad company see or otherwise be made aware of the fact, they ought to take all proper and available means to pre-

¹ *Hammond v. Southeastern Railw. Co.* Maldstone Spring Assizes, 1845, before Lord Denman, cited in *Redfield on Railways*, Vol. 1, 454. "The testimony in this case showed that the danger of emitting sparks is very much increased by overtasking the engine, and that it may be altogether avoided by shutting off the steam in passing a place where there is danger from sparks, or that the danger may be guarded against by mechanical contrivances." (*Henry v. S. P. R. R.* Sup. Ct. Cal. Aug. 2, 1875.)

"The Court below properly refused a nonsuit. We think there was evidence tending to prove that the fire was not the probable result of the ordinary working of a locomotive under like circumstances, and, in such case, evidence that the fire was communicated from the engine is evidence of negligence sufficient to go to the jury.

"There was, however, evidence of specific negligence, in that there was evidence tending to prove that the particular engine was required to perform service which caused it to labor and emit more sparks than if a less number of cars had been attached to it." (*Walford on Railways*, 183, 184, and notes.)

T. P. & W. R. R. Co. v. Pindar, 53 Ill. 447. "Railroad companies are required to provide, and keep constantly in use and in proper repair, the most approved machinery to prevent the escape of fire from their engines, to the injury of property along their lines. If, notwithstanding the use of such machinery, sparks escape, and fire is thereby communicated to buildings, a company will not be deemed guilty of negligence unless the damage results from the neglect of some other duty. But even with the use of the best appliances to prevent the escape of fire, and sparks are produced to a dangerous extent, the company will be deemed guilty of gross negligence." (*Chicago v. Quintance*, 58 Ill. 389.) The use of wood in a coal-burning engine, in a dry and windy time, held to be indicative of gross negligence. (*Chicago v. Quintance*, 58 Ill. 389.)

vent the spread of the conflagration and damage thereby. If it be possible for men on the train to do so, they should put out the fire. They should even stop the train long enough to do so, when by so stopping they do not incur the danger of collision with other trains; and even if it is prudent or necessary for the train to move off, men should be left or sent back from the next station to put the fire out.

The duty is general upon the railroad company, by its employees, to take all the precautions to prevent injury to property of others which sensible, prudent persons would, under similar circumstances, use to prevent the communication of fire to their property.¹

¹ *Cook v. C. T. Co.* 1 Denio, 91; *Field v. N. Y. C. R. R. Co.* 32 N. Y. 339; *Polke v. C. & N. R. R. Co.* 26 Wis. 538, by Cole, J.: "Among other instructions asked by the plaintiff, which the County Court refused to give, was one in substance to the effect that if the jury found from the evidence that the engine set a fire on the track of the roadway, on the day named, adjoining the premises of the plaintiff, and that the servants of the defendant, in charge of such engine and train, knew such fire to be so set and kindled, then the servants of the company were bound to use ordinary care and diligence to extinguish the fire; and if the servants of the defendant knew the fire was so set at or about the time it was so set, and used no efforts whatever to extinguish such fire, but went away and left it burning, such conduct on the part of the servants of the company was evidence of negligence, and ought to be taken into consideration in determining the question whether the train was managed with due care with regard to fire. We think the instruction should have been given. It appears that the train in question was a gravel train, engaged in the repair of the road-bed, and had about twenty-eight men on the train. And even if it had been prudent and necessary for the train itself to move off to the proper station as soon as it was unloaded, in order to avoid collision with other trains, what difficulty was there in leaving behind a sufficient number of men to put out the fire? It was a dry time in the summer, when a fire kindled upon the track of the road would very likely spread to the adjoining premises. Men of ordinary care would, under such circumstances, use proper diligence to prevent the fire from communicating to the property of others. And if, according to the hypothesis upon which the instruction is framed, the employees of the company knew that a fire had been kindled on the track by means of the locomotive, they were certainly bound to use ordinary care and diligence to extinguish it; and if they used no efforts whatever to extinguish it, but went away and left it burning, such conduct, we think, would amount to gross negligence."

These remarks are made with reference to the character and condition of the train in question. "In the case of an ordinary freight or passenger train, even if the employees knew the locomotive had kindled a fire upon the track, it might not be possible to stop the train and put it out, or leave behind any one for that purpose. The safety of the train and passengers would be a matter of first importance, and negligence could not necessarily be imputed if the servants left the fire burning, without using any efforts to extinguish it. But the instruction, when applied to the facts of the case, raises a very different question." So in *Bass v. C. B. & Q. R. R. Co.* 28 Ill. 19. A case in which sparks

§ 74. Proximate and remote damages by fire from locomotive.—The fact that fire from a locomotive was not communicated directly to the property destroyed is no defense to an action for damages. If it appear that sparks have escaped, or fire-brands or coals have been thrown or dropped from an engine, and that thence fire has got out and spread, it will be of no avail for the company to claim that damage therefrom, for which an action will lie, must be confined to the immediate result upon the premises adjoining the roadway.

It being shown that the fire originated by reason of negligence, the fact that property destroyed is remote from the railroad, that the fire reached it only after passing through intervening lands, does not prevent the owner from recovering damages from the railroad company on the ground that the cause of loss is too remote.¹

from a locomotive set fire to stubble in a wheat-field through which the road ran, and thence spread to plaintiff's wheat stacks. Plaintiff being away from his home, his neighbor tried to extinguish the flames, but could not, and called upon the employees of the company who were near; informed them that the field was on fire by sparks from one of the company's engines, and that, unless they helped him put the fire out, the stacks would be destroyed. The employees of the company refused to try to put the fire out, the stacks of grain were destroyed, and this action brought against the company for the value of the property lost by the fire. The Supreme Court gives its opinion in these words: "Railroad companies in some of the States maintain, at great expense, a regular, well drilled, and efficient police along the line of their roads, through cultivated places, to protect the interests of property-holders from injuries such as those described in this case. They feel and know, in the use of an element so destructive as fire, they ought to be bound to use the greatest precautions. What, then, shall be said of these men, who were on the spot of the fire, who refused to extinguish it, uninfluenced by their duty to their employers or by the common feelings of regard for the interests and property of another, which they should have manifested, and through which they could have saved valuable property from total destruction? It presents a case which will not bear favorable examination, and stamps these men with infamy and disgrace, and for whose conduct the defendant ought to suffer."

Shearman & Redfield on Negligence, 322: "It is the duty of the conductor of a train, not carrying passengers, nor pressed for time, to stop when the train has kindled a fire, and to extinguish it." (*Bass v. Chicago Etc. R. R. Co.* 28 Ill. 9; *I. C. R. R. Co. v. Mills*, 42 Ill. 407; *Piggott v. E. C. R. R. Co.* 3 C. B. 229; *Fitch v. P. R. Co.* 45 Mo. 322; *Bedford v. H. R. Co.* 46 Mo. 456; *Spaulding v. C. R. Co.* 30 Wis. 110; *Case v. N. R. R. Co.* 59 Barb. 644.)

¹ *Kellogg v. C. & N. W. R. R. Co.* 26 Wis. 223; *Perley v. Eastern R. R. Co.* 98 Mass. 417. "Under the instructions, the jury must have found that the fire which destroyed the plaintiff's property proceeded from defendant's locomotive, and came in a direct line, and without any break, to the plaintiff's property. But in reaching plaintiff's land it went across the land of three or four different

It has been claimed that where a fire has, by a locomotive, been set at or near the roadway, a spread of it thence may result from an increased wind, by accidental circumstances, such as accumulations of inflammable materials upon premises not under the control of the company, and for the presence of which the company could not be held responsible, and that, therefore, the business of running locomotives being lawful, railroad companies ought to be held only for proximate, and not remote results, from the escape of fire, and such reasoning is not entirely without foundation upon principle and precedent.¹

§ 75. Railway companies liable for damage by spread of fire.—The general tenor of the later decisions is against the railroad companies, upon the proposition of their liability being confined to the immediate damage by fire from locomotives, and the maxim, *causa proxima non remota spectatur*, is not controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found, whence the damage has ensued, such must be considered the true cause, unless some

parties, which lay between plaintiff's land and the railroad track, and the distance to the plaintiff's land was about half a mile. It was fed, on its way, by grass, stubble, and woodland. The defendants contend that they are not liable for this injury, because it was remotely, not proximately, connected with the escape of the fire from their engine. But it was none the less communicated from the engine because the intermediate land belonged to other persons, nor because the distance was half a mile. If the land had all belonged to plaintiff, and had extended a mile, it would be difficult to establish a line on his land, and to hold that the statute gives him no remedy for the damage happening beyond that line. Nor does the fact that there are several owners make the damage to the plaintiff remote, in the sense in which that term is used, as contradistinguished from 'direct' and 'immediate.'"

¹ *Ryan v. N. Y. Central Railroad Company*, 35 N. Y. 210. In this case, by careless management of its engine, in the city of Syracuse, defendants set fire to their own wood-shed; thence the fire spread to plaintiff's house, a distance of one hundred and thirty feet, the heat and sparks from the burning shed setting fire to the house. The Court held that the company could not be held for the loss of the house; that if it could, it might be made an insurer of the whole city, and that the remoteness of the danger forms the true rule on which the question should be decided, and that the company could only be held for the immediate result from carelessness, negligence, or mismanagement.

Penn. R. R. Co. v. Kerr, 62 Penn. St. 353, in which, by negligence, fire was set to a warehouse, and thence spread to and consumed plaintiff's hotel. It was held that the company were not liable for the loss of the latter. That every one has to take the risks of the vicissitudes of organized society, and that because of the act of negligence the first building was set fire to, does not make the company liable for all consequences.

other, independent of and not incidental to it, can be shown to have intervened between it and the result. The maxim includes liability for all injuries which naturally result from the wrongful act of omission or commission, and the company must take their precautions, and make them extreme, to guard against the escape of fire from their engines, having in view the fact that they are to be held liable, not only for such loss as may immediately ensue, but also all such as are likely to result from any neglect or mismanagement in the construction or use of their engines.¹

§ 76. Must the farmer guard against fire from locomotives?—That he must do so may appear from the recognition of the right of the company to use engines, the escape of fire from which is a danger too obvious to be overlooked by any

¹ *Safford v. B. & M. R. R.* 103 Mass. 583. In this case a fire was set by sparks from a locomotive to wood piled against a freight depot at a village station; the freight-house and contents were soon in a blaze, the wind rose and blew cinders and sparks from the burning depot to plaintiff's dwelling-house, a distance of nearly 1,600 feet, set fire to and destroyed it. Held, that the railroad company was liable for the loss of the plaintiff's house. (*Hart v. W. R. R. Co.* 13 Met. 99; *Perly v. E. R. R. Co.* 98 Mass. 414; *Quigley v. S. & P. R. R. Co.* 8 Allen, 438-40; *Tulerville v. Stampe*, 1 *Ld. Raym.* 264; *Hooknett v. C. R. R. Co.* 38 N. H. 242.) In *Kellogg v. C. & N. W. R. R. Co.* 26 Wis. 238, the cases of *Ryan v. N. Y. C. R. R. Co.* 35 N. Y. and *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353, are commented upon, examined, and disapproved, while the converse of the proposition therein stated is held to be law, and *Perley v. E. R. R. Co.* 98 Mass. 414, is approved and followed, and in *Perley v. E. R. R. Co.* these cases from New York and Pennsylvania are mentioned with disapproval and dissent. (*Henry v. S. P. R. R. Sup. Ct. Cal.* Aug. 2, 1873.)

"It is said that the nonsuit should have been granted, inasmuch as the fire was not kindled in plaintiff's field, but in the field of one Cagney, an adjoining proprietor, from which it extended into the field of the plaintiff. The legal proposition involved in the foregoing statement is, that if by negligence a fire shall commence on the premises of one proprietor and spread from thence to those of another, the latter shall never have his action against him guilty of the negligence. We think this proposition cannot be maintained; to refute it, it is not necessary to establish the counter proposition, that the adjoining proprietor thus injured shall always recover; it may be assumed, perhaps, that a city fire which has its origin in one building will not ordinarily extend throughout a block, and yet a jury may be justified in saying, when a fire is started in a field which constitutes a portion of a larger tract of dry grass or corn fully ripe, that it will usually be driven into another field, from which the first is separated only by a fence of boards. It is a rule, applicable to all cases of mere negligence, that the wrongdoer is liable for proximate and not for remote consequences of his fault." "We are still confident, considering the long, dry season of California, and the prevalence of certain winds in our valleys, that it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct, or proximate consequence of the original firing."

prudent man in the ordinary conduct of his affairs. Thus, if it is negligence for a railroad company to leave dry grass and rubbish to accumulate upon the road-bed and the adjoining lands of the company, it is not clearly apparent why it is not also negligence for the farmer to permit such accumulations to occur on his premises, immediately adjoining, and subject to the same casualty, and be such contributory negligence as to prevent a recovery by him of damages for loss by fire so occasioned.¹ That one may so use his land as though there was no railroad

¹ "Where the carelessness of the plaintiff, as well as that of the defendant, operated directly to produce the injury complained of, the plaintiff has no right to recover; and, in a case where the defendant is entitled to and requests a charge to that effect, the refusal or neglect of the Court to so instruct the jury, in unambiguous terms, is error, for which a judgment in favor of the plaintiff will be reversed." (*R. R. Co. v. Klechbairns*, 63 Ill. 119.) Dissenting opinion of Paine, J., in *Kellogg v. C. & N.W. R. R. Co.* 26 Wis. 241, in which it is said that, as it would be but little trouble for a farmer to plow a few furrows next the line of the road, and to do so would furnish a cheap and natural preventive to the spread of fire; and so soon as it is established to be negligence in a railroad company to leave the dry grass and weeds upon its lands—because, if a fire should occur, it might run across the adjoining owner's stubble-field, and reach his buildings—it follows necessarily that, if plowing a narrow strip on those fields would prevent the loss, and he, after knowledge of the danger, neglects to plow it, he should be held guilty of a want of ordinary care. To say that he should have taken that precaution does not deprive him of the ordinary or beneficial use of his property. It does not impose on him any burden or serious inconvenience. It is usual for farmers to plow their land in the fall. Plowing is an effectual preventive of the spread of fire, and it could hardly be matter of serious consequence to a farmer whether he plowed a strip sufficient for this purpose at one time or another. To determine the degree of negligence in such cases, regard should be had to the facility and effectiveness of the means of prevention which the parties respectively possess; and I think it more clear that an owner, whose buildings are only endangered by reason of the liability of fire to run a half mile across his stubble-fields to reach them, is guilty of negligence if he neglects the simple precaution of plowing a strip sufficiently wide to prevent it, which he might do without any serious burden or inconvenience, than that the railroad company was negligent in not removing the entire dry grass and weeds upon its line, which, as already suggested, could only be done at so great an expense as to make it really impracticable. (*Henry v. R. R. Co.* 30 Vt. 638; *Norris v. R. R. Co.* 28 Vt. 99; *Horstman v. R. R. Co.* 18 B. Mon. 218.)

The propositions are not wholly void of merit that farmers along the line of railways cannot, without negligence, make precisely the same uses of all parts of their land, which might be made without negligence in lands remote from such roads; that persons who enjoy the advantages of these new agents of civilization must bear the burden, in part, of the increased care required to guard against the dangers which they necessarily create; and that the compensation paid by the railway company for the right of way must be assumed to have included payment for such increased care on the land-owner's part. (*Angell on Carriers*, 489; *Babcock v. R. R. Co.* 9 Met. 553; *Norris v. R. R. Co.* 28 Vt. 99; *Boothby v. R. R. Co.* 61 Me. 318; *R. R. Co. v. Parramore*, 31 Ind. 143.)

adjoining, and no danger reasonably to be apprehended from fire from locomotives, does not appear to be wholly consistent with the rights of the company to use fire upon their engines, it being conceded that if the company use all the best appliances to prevent the escape of fire, and are careful and prudent in the management of their engines, they are not responsible for damages which occur, notwithstanding the exercise, on the part of the company, of all due precautions.

§ 77. Farmers not compelled to guard against fire.—The general tenor of ruling by the Courts, of late years, has been to the effect that farmers whose lands lie near to or adjoining railroads may cultivate and use them in the manner which is customary among their neighbors, and may recover for damages caused by fire from sparks or coals from passing locomotives, although they have not plowed up the stubble of their grain-fields, or burned over the lands, or plowed strips of land adjoining the track, or taken other unusual means to guard against negligence on the part of the company. It is not negligence—such as would bar an action for recovery against a railroad company—for a farmer to leave the grass and stubble standing on his pasture or grain-field, along the side of which is a railway track. When the fire is lighted on his land by sparks from an engine, the farmer cannot stand by and let it burn without doing what he reasonably may to protect his property; but where the danger is not seen, but is only anticipated as a possibility merely, or is dependent on the continuance of an observed negligence on the part of the railroad employees, the farmer is not bound to protect himself by unusual precautions, such as plowing, burning over, or otherwise. One who is in the exercise of his lawful business has a right to presume that other persons will so conduct their business as not to interfere with or injure him, and it is not negligence for such a person to assume that he is not exposed to danger which can only affect him through a disregard of law on the part of some other person or a railroad company.¹

¹ *Flinn v. S. F. & S. J. R. R. Co.* 40 Cal. 14. In this case, the plaintiff was in possession of a piece of land, one portion of which was cultivated in wheat, and another portion was used for pasturage. At the time of the injury complained

of, the wheat had been cut, and stood in stacks on the land where it had been grown. The stubble on the grain land and the grass on the pasture were very dry. There were no furrows plowed, or land in any way cleared from inflammable material in the field along the line of the lands of the railway. The grass and weeds along the railroad had been cut and left upon the ground, and had become very combustible. The defendant's engines were provided with the best and most approved apparatus for preventing the escape of sparks; but as a construction train passed along plaintiff's lands, the engine dropped sparks, which ignited the grass and weeds along the track, and a high wind swept the fire through the fence, over the pasture land and stubble-field, to the grain-stacks, and the stacks were entirely consumed by the fire. In the action against the company for the damage done, the Court below held that, although the company was at fault in the condition of its road, the plaintiff himself was at fault in failing to take ordinary precautions to prevent fire, which might unavoidably break out from spreading to his wheat-stacks; that this neglect of plaintiff contributed to the injury complained of, as much as the negligence of the defendant in omitting to clear its road of the weeds and grass which had been cut upon it, and that, therefore, no recovery should be had. The Supreme Court, however, held this ruling to be error, and, because of that error, reversed the judgment, saying: "No one is required to take any precautions against unavoidable or inevitable accidents; for the precautions which could not avert the injury would be futile. Nor is the ignition of combustible material lying on the track of a railroad, by sparks dropped by a passing engine, unavoidable accident. The removal of the combustible matter from the road is an obvious and sure precaution. The rule releasing the defendant from responsibility for damages, because of the negligence of the plaintiff, is limited to cases where the act or omission of the plaintiff was the proximate cause of the injury. The negligence in this case, which was the proximate cause of the destruction of the plaintiff's grain, was the leaving of the dry grass and weeds upon the railroad, where they were liable to be set on fire by sparks falling from passing engines. It was not negligence, in a legal sense, for the plaintiff to leave the grass and stubble standing on his pasture and grain-field. He was not required to destroy or remove either, in order to obviate the consequences of the possible or even probable negligence of the defendant."

Richmond v. Sacramento Etc. R. R. Co. 18 Cal. 357.

Tuff v. Warman, 5 C. B. N. S. 573; *Fitch v. P. R. R. Co.* 45 Mo. 322. "If the conduct of a railroad company's agents was the immediate cause of fire spreading from a locomotive, and if, with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the company is not excused from liability by some remote negligence in the plaintiff; such as that he carelessly left grass in the fence-corners adjacent to the road, whereby the fire was kindled. Such carelessness, not being the proximate cause of the loss, is not contributory negligence which will excuse the company."

Robinson v. W. P. R. R. Co. 48 Cal. 409; *Cleveland v. R. R. Co.* 8 O. R. 570; *Shearman & Redfield on Negligence*, 29.

CHAPTER VI.

DAMAGE TO LIVE-STOCK BY RAILROAD CARS OR ENGINES.

- § 78. Liability of railway for injury to animals.
- § 79. Contributory negligence by owner of animals.
- § 80. The owner of animals must take due care of them.
- § 81. Damage by locomotives to animals running at large.
- § 82. Collision with live-stock where the railway company has right of way.
- § 83. Contract to fence by railroad company with land-owner.
- § 84. Responsibility of railroad companies to the public.
- § 85. Burden of proof of negligence when animals are injured by locomotives.
- § 86. First duty of railway companies to guard their trains.
- § 87. Railway companies may regulate speed of trains.
- § 88. Laws as to collision with animals are not for the benefit alone of the owner of live-stock.
- § 89. The duty of railway companies as to gates and other openings in fences.
- § 90. Reasonable diligence only required in keeping gates closed.

§ 78. Railway companies liable for injury to animals.—

The general rules as to the liability of railroad companies for damage by their trains or engines running into live-stock, to be deduced from the great number of decisions, may be stated, in substance, to be that, when the owner of the animals can show that they were properly upon the track, so far as he was concerned; or, differently stated, that it was through the neglect of the company¹ that they got upon the roadway, the company

¹ 4 Jones' Law, 524; *Towns v. Cheshire R. R. Co.* 1 Foster, 363, in which is invoked the common-law rule that the owner of animals is bound to fence them in, and the rule is held applicable to actions against railway companies, citing the leading case on the rule, of *Rust v. Low*, 6 Mass. 90. It is to be observed, however, that in many of the States the common-law rule is held never to have been adopted as part of the law.

1 Redfield on Railways, 464-5: "For instance, if an animal escape into the highway, and thus get upon the track of the railway, where it intersects with the highway, and is killed, the company is not liable. And if the animals are trespassing upon a field, and stray from the field upon the track of the railway, through defect of fences, which the company are bound to maintain, as against the owner of the field, and are killed, the company are not liable, either at common-law or the English statute, or upon the ground that the defendant exercised a dangerous trade. The obligation to make and maintain fences, both

is liable; and so, if being upon the track they are seen by the engine-driver, and he wantonly runs into them, when, with reasonable care, he might have avoided the collision, the company may be held responsible for the damage done.¹

The decisions upon these propositions are not quite uniform in their tenor, but are generally to the effect, substantially, that the company is exempt from liability where it is free from neglect of duty in fencing, or, by proper cattle-guards, preventing animals from getting in the way of trains.²

But if the company is bound to maintain fences, as against the owner of the animals injured, and fails to do so, and through neglect of this duty, by absence of or defect in fences, the animals get upon the road, the company must make good the loss which occurs by reason of this neglect.³

at common-law and under the statute, applies only as against the owners or occupiers of the adjoining close." (*Ricketts v. E. & W. D. Co.* 12 C. B. 108; *Jackson v. R. R.* 25 Vt. 150.)

¹ A railroad company is liable, on ground of negligence, for injury to live stock, through an engineer's want of ordinary care and skill, although the same were wrongfully upon the track. (*Toledo R. R. Co. v. Brag*, 57 Ill. 514; *Rockford R. R. Co. v. Lewis*, 58 Ill. 49; *T. R. R. Co. v. Ingraham*, 58 Ill. 120; *C. R. R. Co. v. Smith*, 22 Ohio St. 227.)

"In an action to recover the value of cattle alleged to have been killed on defendants' road by their locomotive and train, it appeared the cattle could have been seen on the track by the engineer, if he had been on the look-out, for a distance of more than half a mile; yet he made no effort to slacken the speed of the train. Held, it was gross negligence, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company." (*C. Etc. R. R. Co. v. Baine*, 55 Ill. 226; *M. Etc. R. R. Co. v. Malone*, 46 Ala. 301.)

² *Redfield on Railways*, 464, Sec. 123. "The decisions upon the subject of injuries to domestic animals by railways are very numerous, but may be reduced to a comparatively few principles. Where the owner of the animals is unable to show that, as against the railway, they were properly upon the track, or, in other words, that it was through the fault of the company that they were enabled to come upon the road, the company are not, in general, liable, unless, after they discovered the animals, they might, by the exercise of care and prudence, have prevented the injury."

³ *Perkins v. Eastern R. R. Co.* 29, 307; *Knight v. Abert*, 6 Penn. St. 472; *Phila. & G. R. R. Co. v. Wilt*, 4 Whart. 143; 1 *Redfield on Railways*, 466, Sec. 5. "But if the railway is bound to maintain fences, as against the owner of the cattle, and they come upon the road through defect of such fences, and are injured, the company are, in general, liable, without further proof of negligence." (*Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer Etc. R. R. Co.* 8 Barb. 390; *Horn v. A. & S. L. R. Co.* 35 N. H. 169; *Smith v. E. R. R. Co.* 35 N. H. 356.)

But in an action against a railroad company, to recover for stock killed by a passing train, the burden is upon the plaintiff, to show either that the killing or

§ 79. Contributory negligence by owner of animals.—

As to what negligence in guarding his stock will vitiate the owner's claim for damages for injury done to them by railroad trains or engines, the well settled principle of the common law, that a plaintiff is not entitled to recover for injuries to which his own fault or negligence has directly contributed, appears to apply.¹ It is true that local statutes seem to control, if not in some instances to abrogate, the application of it; but the general tenor of decisions construing these statutes is such as to hold the owner of the stock responsible for his own carelessness except where, in terms, the statute provides that the company shall be held liable at all events and without reference to any question of negligence, either on the part of the company or that of the owner of the animals.²

The general result of these laws has been held to be to leave the question of the effect of the conduct of the owner of the animals upon his right to recover for the acts of others where it was at the common law. But the onus of proof is changed by the statutes, so that where stock is killed the laws impute negligence to the company, unless it can show that the damage was the result of unavoidable accident.³

injury was done at a point where the company had the right to fence and had not fenced, or that the company were guilty of negligence in causing the injury. (*Comstead v. D. M. Etc. R. R. Co.* 32 Iowa, 376.)

¹ Where animals escape from their inclosures, even where by the law prohibited from running at large, if such escape is without the fault or knowledge of the owner, and the animals stray upon the railroad track at a point where the company had failed to comply with the law requiring it to fence, the owner may recover for damages for their injury by being run into by engines or cars. (*Ohio & M. R. R. Co. v. Jones*, 63 Ill. 472; *Sawyer v. R. R. Co.* 105 Mass. 196; *Chicago & N. W. R. R. Co. v. Harris*, 54 Ill. 528.)

² "In an action under the statute of Indiana, against a railroad company, for killing cattle, when the liability of the company is based solely on a failure to fence its track, the question of contributory negligence does not arise; and if the cattle are killed or injured at a point where the company could lawfully have fenced its track, but neglected to do so, the company is liable." (*Toledo Etc. R. R. Co. v. Cory*, 39 Ind. 218; *Ind. Etc. R. R. Co. v. McBrown*, 46 Ind. 229; *Ohio & M. R. R. Co. v. Miller*, Id. 215.)

Under the statute of Indiana, it is not necessary to aver that the animal went upon the track at a place where the road was not fenced; the reasonable inference from the averments of the complaint being, that the road was not securely fenced at the place where it went upon the track. (*R. R. Co. v. Miller*, 46 Ind. 215.)

³ The statutes concerning fences in the United States generally are such that the company, by fences and cattle-guards, must prevent cattle from coming up-

§ 80. The owner of animals must take due care of them.—But even the existence of these laws making the company responsible for damages done to live stock, where the road remains unfenced, does not relieve the owner of the animals from due care of them—the general principle remains applicable to him. Every man is bound, at his peril, to keep his cattle off the track, and if he do not, and they suffer damage by his own willful conduct or neglect, he has no claim upon the company or its servants, but he may be liable for damages resulting to the company or to passengers over the road.¹ Although it has been held, in some of the States, that under the statutes there prevailing the railroad companies are liable for all damages to stock killed or injured at points where the corporation should have fenced but did not, without reference to the question of fault on the part of the plaintiff, or even of negligence on the part of defendant, on the ground that the law is peremptory, and

on their roadway, and from the fact that they are on the track it is manifest that the company has not accomplished, in that instance, the end for which the law was made; and where a railroad company seeks to shield itself from liability for stock killed where the road is not fenced, on the ground that it should not be fenced at that point, the onus is on the company to establish that fact. (*R. R. Co. v. O'Conner*, 37 Ind. 95; *R. R. Co. v. Sullivan*, 38 Ind. 262.)

¹ *Shearman & Redfield on Negligence*, 471: "These statutes are not to be so literally construed as to enable one who willfully turns his cattle upon a railroad to recover for injuries suffered by them." (*Ibid*, 462.) "So the neglect of a railroad company to build a fence, does not exonerate the plaintiff from the obligation to take ordinary care for the protection of his animals, where the fence, if built, would not have been sufficient to close access to the track. If the plaintiff's negligence was the direct and proximate cause of the injury, the defendant should have the benefit of that fact, notwithstanding its neglect, since its care would not have sufficed to prevent the injury from occurring."

In New York, it has been held that the statutes compelling railroad companies to fence do not make them insurers against accident by running into cattle and causing injury to them thereby; but their liability in such cases is a question of neglect of duty. (*Murray v. R. R. Co.* 3 Abb. (N. Y.) App. Dec. 339.) "The general rule, that when cattle or other stock are permitted to go at large, in uninclosed woods and fields, the owner of such stock takes the risk of their loss or injury by unavoidable injury, applies when stock is permitted to range in proximity to passing railway trains, and to wander on the uninclosed track of a railway." (*Memphis R. R. Co. v. Blakeny*, 43 Mis. 218; *Ruiford v. M. R. R. Co.* Id. 238; *U. P. R. R. Co. v. Rollins*, 5 Kans. 167; *Lock v. St. P. R. R. Co.* 15 Minn. 350.) But the mere fact that an animal is at large by the "permission of the owner, and is run over and killed by a locomotive, does not justify the conclusion that the injury was occasioned by the willful act of the owner; and in an action against the railroad company to recover for the loss of the animal, the burden of proof to show a willful act on the part of plaintiff rests on the railroad company." (*Stewart v. R. R. Co.* 32 Iowa, 561.)

to the effect that railroad companies shall be held responsible for all such losses, and the Courts have no power by inquiry into collateral issues to vary the terms of the law.¹

§ 81. Damage by locomotives to animals running at large.—The right to pasture common or uninclosed lands appears to be subject to the right of railroad companies to run their trains through such lands over a roadway not fenced, where there is no absolute statutory provision requiring that railroads should be fenced when passing through uninclosed lands; and so where parties themselves may, but fail to do so, bind the company to fence in the absence of statutory provision compelling such action, it is negligence on the part of the owner of animals to allow them to run at large in the vicinity of the railway; and for damages by trains running into his stock the owner cannot recover, where the common-law rule as to fencing in cattle is in force;² and even where the statute imposes upon

¹ Under the Indiana statutes, a railroad company is liable for stock killed or injured at a point where it is required to fence its track and has not done so, without reference to the question of fault on the part of the plaintiff, or negligence on the part of defendant. (*Jeffersonville R. R. Co. v. Ross*, 37 Ind. 545; *Ohio & M. R. R. Co. v. Miller*, 46 Ind. 215.) But it is essential to the liability of the railroad company, for the death or injury of an animal, that it should be actually touched by the engine, cars, or other carriage. (*Ind. Etc. R. R. Co. v. McBrown*, 46 Ind. 229.)

So, in California, the road being unfenced, the company must bear the loss by damage to cattle. (*McCoy v. C. Etc. R. R. Co.* 40 Cal. 532; *Brooks v. N. Y. & E. R. R. Co.* 13 Barb. 594; *Lafferty v. R. R. Co.* 44 Mo. 291; *Jeffersonville R. R. Co. v. Avery*, 31 Ind. 277.)

² The general rule, under the common law of England, is that a railroad company, like any other proprietor of land, is under no obligation to fence its road, and trespassers come there at their peril. (*Shearman & Redfield on Negligence*, 531; *N. Y. & E. R. R. v. Skinner*, 19 Penn. St. 298; *North P. R. Co. v. Rehman*, 49 Penn. St. 109; *Coy v. Utica R. R. Co.* 23 Barb. 643; *Williams v. M. R. R. Co.* 2 Mich. 259, where a railroad company, which was not obliged to fence unless requested to do so by the land-owner, agreed with an adjoining owner not to fence against his land, and a cow strayed from such lands upon the track of the road, and was killed by one of their trains. Held, that the owner of the cow, having by his own fault contributed to the loss, could not recover of the company. (*Town v. P. Etc. R. R. Co.* 2 R. I. 404.) And such would appear to be the rule even where by the common law cattle are permitted to run at large. Railroad companies are not bound by common law to erect fences to keep out cattle. (*Shearman & Redfield on Negligence*, 452; *Memphis & C. R. R. v. Orr*, 43 Miss. 288.) "So long as railroad companies, on the one hand, and owners of live stock, on the other, are not required to fence their roads to prevent intrusions, on the other to restrain their stock, the respective rights of these parties appear to be defined upon principles alike just to both." (*New O. Etc. R. R. Co. v. Field*, 46 Miss.

the company the duty of fencing, this duty may, by contract, be assumed by the adjoining land-owner, and where by agreement the owner of the premises through which a railroad runs takes upon himself the duty of building or maintaining fences, he must do so or neglect it at his peril, so far as any loss of or injury to his live stock is concerned.¹

573; Id. 578.) "It is now well settled by authority and reason, in this State, that uninclosed lands, although private property, are a *quasi*-common, or, as expressed in local parlance, a 'range,' in which the owners of cattle, and domestic animals generally, may permit them to go out at large and depasture without thereby incurring any responsibility as trespassers. The common-law principle, which required the owner to confine his stock on his own premises, and made him a wrongdoer if they escaped into the lands of his neighbor, never obtained in this State. But the converse is the rule: that each occupant of lands must secure his fields by strong and sufficient inclosures against the intrusion of animals; and that the owner cannot be held as a trespasser for their entering the close unless they have broken a fence deemed in law sufficient to exclude them. Uninclosed lands, in this State, are held subject to this right or easement. Railroad companies, like other proprietors, are not bound to inclose their roads to keep off cattle." "Persons living contiguous to railroads have the same right as others; but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road; the company cannot detain them, *damage feasant*, any more than any other land-owner; nor can they treat them as unlawfully there, and therefore relax their care and efforts to avoid their destruction. The only justification of the company for the injury to them is that, in the prosecution of their ordinary and lawful business, the act could not be avoided by the use of such care, prudence, and skill as a discreet man would put forth to prevent or avoid it. The owner of cattle at large on the range takes the risk of injury or total loss by the locomotive and train, if the cattle exposed upon the track could not be saved by prudence, skill, or caution. The company is excused and justified where, after using the means suggested by skill, prudence, and caution, the injury or destruction could not be avoided." (*Vicksburg & J. R. R. Co. v. Patton*, 31 Miss. 176; *Raiford v. M. C. R. R. Co.*, 43 Id. 238.)

¹ "Where a railroad company has a valid contract with the owner of the adjoining land, by which the latter agrees to erect and maintain the fence required by law, this agreement has generally been held a good defense for that company against any claim of such land-owner, or of a grantee or tenant of such land under him, founded upon the statute; and, even if the fence is destroyed by the culpable negligence of the railroad company, this does not revive its statutory liability to the adjoining occupant. His remedy is by an action for the value of the fence thus destroyed, which it is his duty to replace. He is not at liberty to leave the fence out of repair, and then to hold the company responsible for all damage that may ensue." (*Shearman & Redfield on Negligence*, 463; *Toledo R. R. Co. v. Howell*, 38 Ind. 447; *Talmadge v. Rensselaer Etc. P. R. Co.* 13 Barb. 493; *T. H. R. R. Co. v. Smith*, 16 Ind. 102; *Terry v. N. Y. Central R. Co.* 22 Barb. 574; *Eastern v. L. M. R. R. Co.* 14 Ohio St. 48; *Indianapolis R. R. Co. v. Petty*, 25 Ind. 413.) A railroad company maintaining and operating a railway upon a person's land, by his consent, is nevertheless bound to so avail himself of such consent as to work no injury to the live stock of the person who has permitted him to pass through his land; and it is immaterial that the company

§ 82. Collision with live stock where right of way has been granted.—It will not, from the premises above given, result that a mere license to occupy lands sufficiently to construct through them a railway, places the railroad company in such position as to free it from responsibility for damages by injury to stock. It may occur that the land-owner does not desire to impede the construction of a railroad, and may allow the company to build its road and run its trains without pressing his claim for damages for taking his land.¹

In such cases it could not well be claimed that, because he favored the company, the land-owner should lose the use of his land for pasture. His animals would rightfully be on his premises, his domestic animals are rightfully on the land adjoining the roadway, and nothing prevents their obeying natural instincts to wander from place to place; the railroad companies may, also, with their train, be rightfully there, and the general rule applies that a man is bound to so use his property as not to injure his neighbor, and thence would, by a natural law, result a duty on

was not bound to fence its track, or that it could not have avoided striking the animal after it was seen. (*Mathews v. R. R. Co.* 18 Minn. 434.)

Some doubt is in one case expressed whether, by agreement, the company can evade the statutory liability for stock injured or killed. (*Shepherd v. R. R. Co.* 35 N. Y. 641.) But there appears to be no good reason between the parties—the railroad company on one hand, and he through whose lands the road runs on the other—why they should not, by agreement, regulate their liabilities, one to another, in the premises, by a waiver, on the part of the land-owner, of a statutory advantage.

As a matter of public policy, it may be that this right to waive the advantage, given by statute against the company, should not be conceded. The interests of the traveling public are involved, and the same reasoning under which the constitutionality of statutes requiring railroad companies to erect and maintain fences along the line of their roads has been upheld, viz., as a police regulation for the protection of the traveling public, (*Penn. R. R. Co. v. Riblet*, 66 Penn. St. 164) may deprive the persons whose land lies contiguous to a railway from releasing the company from its statutory liability. At all events, it must be conceded that no agreement or act of a land-owner in relation to fences is a defense to an action brought by a third person not claiming under such land-owner. (*Corwin v. R. R. Co.* 13 N. Y. 42; *Jeffersonville R. R. Co. v. Nichols*, 30 Ind. 321.)

¹ A land-owner released to a railroad company the right of way through his land, and further released and relinquished to the company all damages and rights of damages, actions and causes of action, which he might sustain or be entitled to by reason of anything connected with or consequent upon the location or construction of said work, or the repairing thereof, when finally established or completed. (*Cleveland R. R. v. Crossley*, 36 Ind. 370.)

the part of the company to fence, or failing to do so, answer for the default.¹

§ 83. Contract to fence by railway company with land-owner.—A railroad company may have a valid contract with the person who owns or is in the occupancy of land adjoining the roadway, by which such land-owner or occupant may be bound, as between himself and the corporation, to build and keep in repair the fences along the sides of the road, which the law prescribes. Where such an agreement exists it would appear to be a bar to any action against the company founded

¹ *Williams v. Groncott*, 4 B. & S. 149; *Rogers v. N. R. Co.* 1 Allen, 16; *Matthews v. St. P. & C. R. R. Co.* 18 Minn. 434. "The defendant, without paying for or securing any compensation to the plaintiff, and without acquiring any right to make and maintain its railroad through his land by proceeding therefor as prescribed in its charter, constructed and operated the same through plaintiff's pasture, and, while so operating the same with its engines and cars, ran against and injured a cow belonging to plaintiff, and by him kept in said pasture. Held, that defendant was prima facie a trespasser, and liable for said injury. Defendant alleged, in its defense, that it went upon the land and constructed its road thereon, and at the time of said occurrence was operating the same with its engines and cars, by and with the license and permission of plaintiff. Held, that if this were so, the law, nevertheless, in such case, cast upon the defendant the duty to prevent such permissive use of plaintiff's land from injuring plaintiff's cattle kept by him in said pasture, and that it was, therefore, liable for any injury occurring to them through such use, and that it was immaterial either that defendant could not have avoided striking the cow after she was seen, or that by defendant's charter it was not obliged to fence its road."

The legislature having the right to grant a franchise, and permit the railroad company to take private property for a quasi-public use, limits properly the exercise of the right so to do by prescribing the manner of condemning the land; and if the railroad company does not avail itself of the privilege by submitting to the rule imposed, it is a trespasser in taking the land, and cannot shelter itself under its charter and the State laws. (*Blake et al. v. W. & S. P. R. R. Co.* 19 Minn. 376; *State v. R. R. Co.* Id. 434.)

Cook v. M. & St. P. R. R. Co. Sup. Court of Wis. April, 1875. "The complaint avers that, at the time of the plaintiff's making a conveyance of a right of way over his land to the O. & M. R. R. Co., and as a part of the consideration for such conveyance, it was agreed, between plaintiff and said company, that the latter should construct two farm-crossings and two cattle-guards on said premises. Held, that this does not show any covenant running with the land, and therefore does not show that defendant, as lessee of the railroad of said company, is under any obligation to build such cattle-guards, although he took the lease with notice of such agreement of his lessor.

"The action being for the killing of plaintiff's horse by a train on the road of the O. & M. Company, held and operated by the defendant as lessee, and the only negligence alleged being defendant's failure to construct one of said cattle-guards on plaintiff's land, the complaint is held bad on demurrer."

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upon failure to fence, so long as the only person injured is the party so contracting with the company.¹ Such agreements have been generally sustained by the Courts, and also have been held to be such as are not void within the Statute of Frauds, which renders void an agreement not to be performed within a year, when the contract is not in writing.² Such contracts are binding, not only upon the owners of the land, so far as to deprive them of an action against the company for injuries to animals, when such injuries result from breach of the contract to fence, but also hold the tenant³ or grantee⁴ of the original owner who made the contract.

This proposition is not conceded by all the Courts, and in one, at least, it has been held that it is no defense that the party whose cattle were killed was legally bound to build such fences as would prevent his cattle from straying upon the railroad, under a covenant between his assignor and the company; that,

¹ "Where, by contract with a railroad company, the owner of the land through which the road runs has undertaken to maintain the fence, no recovery can be by him had against the company for an injury to his animals which resulted from his failure to perform his part of the contract." (Ind. R. R. Co. v. Petty, 25 Ind. 413; Talmadge v. R. R. Co. 13 Barb. 493; Pluckwell v. Wilson, 5 Car. & P. 375; Williams v. Holland, 6 Id. 53; Lack v. Seward, 4 Id. 106; Waldron v. R. R. Co. 8 Barb. 390; Luydan v. Moore, 8 Id. 358; Tonowanda R. R. Co. v. Munger, 5 Denio, 255; Shepherd v. Hess, 12 Johns. 443; Deyo v. Stewart, 4 Denio, 101.)

² Talmadge v. R. & S. R. R. Co. 13 Barb. 498. The contract might have been carried into effect within a year, and was therefore valid, though made in parol. (2 Leigh's Nisi Prius, 1045; Donellan v. Reed, 3 Barn. & Adol. 899.)

³ "Where, by contract with a railroad company, the owner of the land through which the road runs has undertaken to maintain the fence, no recovery can be had by him against the company for an injury which resulted from his failure to perform the contract, and the tenant of the land-owner, thus bound to maintain the fence, is in no better position to maintain the action than the proprietor." (Toombs v. R. R. Co. 18 Barb. 583; Duffy v. R. R. Co. 2 Hilt. 496; Cinc. R. R. Co. v. Waterson, 4 Ohio St. 424.)

⁴ Shearman & Redfield on Negligence, 463; Terry v. R. R. Co. 22 Barb. 574; Easter v. R. R. Co. 14 Ohio St. 48. "T, by deed, duly recorded, conveyed to a railroad company the right of way, as the road was located; and covenanted for himself, his heirs and assigns, to erect and maintain a fence on each side of the right of way. T subsequently conveyed the land, through which was the right of way, to H, by deed in fee, and E, a tenant holding under H, brought an action against the company for killing his horse, it being on the track where it passed through the land, and no fence having been erected, by the negligent running of the engine. Held, that the assignee of T was so far affected by the covenant in the grant that he could derive no advantage by its breach, and that he could not claim from the railroad company a higher degree of care to avoid injury to a horse being on the track through the land, than if the covenant had been kept."

notwithstanding such covenant, it was the duty of the company to see the fence built, and, failing in that, they are liable.¹

But the general tenor of the authorities is to the effect that the proprietor of the land may legally bind himself to build and maintain the fences; that such a contract may be made a covenant, running with the land, and bind his successors in interest and their tenants, and that such is the law is claimed by the best of the modern text-writers.²

§ 84. Railway companies responsible to the public.

—Railroad companies cannot so change their liability by contract with the owner of land adjoining the roadway as to avoid the responsibility for damages by injury to domestic animals which belong to strangers to the contract; and no agreement or act of a land-owner in relation to fences is a defense to an action brought by a third party, who is not in priority with such land-owner.³

The statutes by which is imposed upon railroad companies the duty of maintaining fences and cattle-guards are enacted for the benefit of the owners of domestic animals, which are liable to stray upon the road-bed, and this responsibility cannot be shifted by the company in such manner as to deprive the portion of the community who have live-stock, of the protection to their property by such statutes as will tend to render the owners of such other property as railroads, and the trains running on them, especially careful to guard against doing damage.

The benefit of the American statutes is generally not confined to owners or occupants of land immediately adjoining a railroad, but extends to all owners of domestic animals.⁴ And the company can no more avoid its responsibility by contract with the adjoining land-owner than it could by employing a party to do the work of fencing, and, on his failure to do his work, throw on him the direct responsibility to the person who has suffered by his neglect.

¹ *Shepherd v. R. R. Co.* 35 N. Y. 641.

² *Shearman & Redfield on Negligence*, 463.

³ *Corwin v. R. R. Co.* 13 N. Y. 42; *Jeffersonville R. R. Co. v. Nichols*, 30 Ind. 321.

⁴ *Ind. R. R. Co. v. Meek*, 10 Ind. 502; *Brown v. R. R. Co.* 12 Gray, 55; *Ind. R. R. Co. v. Townsend*, 10 Ind. 38; *Fawcett v. R. R. Co.* 16 Q. B. 610.

The statutory requirements under which railroad companies are permitted to exist and do business are of a *quasi*-police character, in so far as they tend to protect property of persons whose contiguity to the roadway render them especially liable to injury, and not only the owner of live-stock, but the traveling public is interested in the strict enforcement of the laws requiring railroad companies to fence.¹

§ 85. Burden of proof as to negligence.—As to what is negligence on the part of the owner of live stock sufficient to prevent his recovery from the railroad company of damages for their injury by passing trains, and what may be deemed negligence on the part of the railroad company or its employees of such a character as to make the corporation legally responsible for damage by collision with domestic animals, have been subjects of considerable discussion in the Courts.

Apart from legislation by which statutory provision has been made, the fact of domestic animals being killed or injured by the companies' engines or trains is not *prima facie* evidence of negligence such as will charge the railroad company.² A dis-

¹ Shearman & Redfield on Negligence, 494; Chicago Etc. R. R. Co. v. Triplett, 38 Ill. 482; Chicago R. R. Co. v. McLaughlin, 47 Ill. 265; Chicago Etc. R. R. Co. v. Stumps, 55 Ill. 367.

² Galpin v. R. R. Co. 19 Wis. 604; Ind. R. R. Co. v. McClure, 26 Ind. 370; Ill. C. R. R. Co. v. Middlesworth, 46 Ill. 495; Chicago Etc. R. R. Co. v. Cauffman, 38 Ill. 424; 1 Redfield on Railways, 464. "The decisions upon the subject of injuries to domestic animals by railways are very numerous, but may be reduced to a comparatively few principles. Where the owner of the animals is unable to show that as against the railway they were properly upon the track, or, in other words, that it was through the fault of the company that they were enabled to come upon the road, the company are not, in general, liable, unless, after they discovered the animals, they might, by the exercise of proper care and prudence, have prevented the injury." It is to be observed, however, that this rule yields to distinct statutory enactment such as exists in some of the States whereby, in terms, the fact of the injury is made *prima facie* evidence of carelessness on the part of the company. (Danner v. R. R. Co. 4 Rich. Law, 329; Murray v. R. R. Co. 10 Id. 227; Balcom v. R. R. Co. 21 Iowa, 102; Whitbeck v. R. R. Co. Id. 374; Ill. C. R. R. Co. v. Whalen, 42 Ill. 395.) But these statutes are in the nature of exceptions to a general rule. (Shearman & Redfield on Negligence, Sec. 479.) "In South Carolina, proof that horses or cattle were killed by a train is sufficient *prima facie* evidence of negligence on the part of the railroad company. This may be right where the common law of the State binds the railroad company to fence out cattle. But where the English common-law rule prevails, the plaintiff must give further evidence than this to make out a *prima facie* case. The

inction has been made, in this respect, between injuries to permanent property situated along the line of the railroad, such as injury to buildings by fire communicated by the company's engines, and damages to cattle which are constantly moving from place to place.¹ But the general rule appears to be applicable, that all persons are bound to so conduct their business as to avoid doing injury to persons other than themselves, who have an equal right under the law to pursue their avocations, and the running of railroad trains must be so conducted as to avoid collisions with animals, where due precautions could prevent them. As to what are proper precautions, the observance of which would negative the charge of negligence, is a question of fact,

burden of proof is upon the plaintiff to show that the cattle were lawfully there, and that the railroad company was negligent. And, if the cattle were not lawfully there, he must prove such negligence as will nevertheless make the company liable. Even where cattle may lawfully run at large, the South Carolina rule is not followed; and the plaintiff must prove some act of negligence. If the statutes concerning fences are relied upon as the ground of the action, the plaintiff must prove the want of or defect in a fence. (*Scott v. R. R. Co. 4 Jones' [N. C.] Law, 432; Jones v. R. R. Co. 67 N. C. 122; Bellef. Etc. R. R. Co. v. Schruyhart, 10 Ohio St. 116; Ind. Etc. R. R. Co. v. Wharton, 13 Ind. 509; R. R. Co. v. Brown, 23 Ill. 94; R. R. Co. v. Sumner, 24 Ind. 631; Walsh v. R. R. Co. 8 Nev. 110.*) "In actions for damages, arising from alleged negligence, the burden of proof is on the plaintiff." (*Owens v. R. R. Co. 58 Mo. 386; Norton v. Itner, 56 Mo. 351; McDonnell v. R. R. Co. 115 Mass. 564.*)

And "a railroad corporation is not liable for killing animals, which, being unlawfully upon a lot of land, go thence upon its track, and are there killed by a passing train, although it was the duty of the corporation to maintain a fence between its track and said lot, and it did not do so, unless the killing was wanton or malicious." (*Id.*)

Comstock v. R. R. Co. 32 Iowa, 376; but see McCoy v. R. R. Co. 40 Cal. 532, where the converse of the proposition is held to be law. So in Macon Etc. R. R. Co. v. Baber, 42 Ga. 300.

¹ *Scott v. R. R. Co. 4 Jones' Law, 433; Ellis v. R. R. Co. 2 Ire. 138; Piggot v. R. R. Co. 3 M. G. & S. (54 E. C. L.) 229; Herring v. R. R. Co. 10 Ire. 406.* The language of the opinion of this last case, commenting upon the two preceding ones, is: "In both cases, fire was communicated to the property of the plaintiff—in the one case a barn, in the other a fence, was set on fire by sparks from the cars. It was proven in both cases that the cars had been running for a long time without doing any damage, and, things remaining in the same condition, the fact that fire was communicated on a particular occasion was properly held to be *prima facie* evidence that it was the result of negligence." The opinion then proceeds to point out the distinction between a barn or fence, which is *stationary*, and an animal, which has the power of locomotion, and the conclusion is that, in respect to the latter, the principle has no application, because things do not remain in the same condition, and the presumption of negligence in running into an animal because it had never been run into before does not arise because the animal would not have been where it could have been run into.

controlled to a considerable extent by statute, and is a matter of fact for consideration of the jury,¹ except where the proof is all one way, either in favor of or against negligence, in which case the inference is always one of law for the Court.²

§ 86. First duty of railway companies to guard their trains.—It is the paramount duty of a railway company, in the conduct of its trains, to care for the safety of persons and property traveling and being transported over their road; this duty is to be first regarded, and subordinate to it is that of avoiding unnecessary danger to animals straying upon the road.³

¹ *Toledo Etc. R. R. Co. v. Bray*, 57 Ill. 514; *Rockford Etc. R. R. Co. v. Bray*, 58 Ill. 49; *Cinc. Etc. R. R. Co. v. Smith*, 22 Ohio St. 227; *Gilman v. R. R. Co.* 60 Me. 235; *Smith v. R. R. Co.* 34 Iowa, 96; *Keliher v. R. R. Co.* 107 Mass. 411; *Sawyer v. R. R. Co.* 105 Mass. 196; *Memphis Etc. R. R. Co. v. Blakeney*, 43 Miss. 218; *Bemis v. R. R. Co.* 42 Vt. 375. "The liability of a railroad company for the killing, by a train, of an animal which wrongfully strayed upon the track, depends on the question whether the engineer of the train used ordinary care to avoid doing injury. And this question is for the determination of the jury, in view of the circumstances of the particular case."

"Where the track of a railroad passed through a cut eighty rods long, and a horse of the owner of the land was near the track at the entrance to the cut, and the whistle of an approaching engine was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was run on, and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestle-work at the other end of the cut, and was killed, when the engine could have been stopped after the horse was in the cut, and before it jumped into the trestle-work, held, that the company was guilty of such negligence as rendered it liable at common law for the value of the horse. The negligence in such case is willful." (*Indianapolis Etc. R. R. Co. v. McBrown*, 66 Ind. 229.)

² *Morrison v. R. R. Co.* 56 N. Y. 307. In actions for damages against railroad companies, negligence "is not in every case a question for the jury of fact, or of fact and of law, to be given to the jury with instructions. Where the facts are undisputed, the question of contributory negligence may become one of law, as the other questions which arise upon a trial, and are submitted to the decisions of the Court on a motion for nonsuit or otherwise." (*McIntyre v. R. R. Co.* 37 N. Y. 287.)

"Although, in many cases where the facts from which negligence is to be inferred are undisputed, the question of negligence is one of law, to be passed upon by the Court, yet if the facts are disputed, and the evidence conflicting, the question should always be left to the jury." (*Owens v. R. R. Co.* 58 Mo. 386.)

³ "The first duty of a railroad company is to its passengers; and if an engineer is compelled to choose between risking the safety of passengers, or even of freight upon his train, and running over cattle on the track, he is justified in adopting the latter alternative." (*Shearman & Redfield on Negligence*, 494; *Louisville Etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Bemis v. R. R. Co.* 42 Vt. 375.)

The liability of a railroad company for the killing by a train of animals which wrongfully stray upon its track, in all cases not strictly provided for by statute, depends on the question whether the engineer of the train used ordinary diligence and care to avoid doing the injury. This is what is submitted to the Court, or jury, on the trial of the action for damages, and regard must be had to the circumstances of the particular case. There is no strict rule which compels the engineer, on seeing the danger, to slacken the speed of the train, unless he can do so with safety, and regard to the necessities of the case as to being at a place where he is to pass another train, or to maintain his position on the time-table so as not to endanger other trains.

§ 87. Railway companies may regulate speed of trains without regard to possibility of animals having got upon roadway. The owner of cattle who does not keep them within his own inclosure, when he might do so by proper care, cannot require of a railway company to regulate the management and speed of trains with reference to cattle coming upon the track. Such companies, like all others, have a right to regulate the management and conduct of their business solely with reference to the security of persons and property in their charge, not only on the individual train which is immediately affected by intrusion of animals on the roadway, but also on all other trains, the safety of which depends upon the promptness of the train in

"Necessary efforts made by the agents of a railroad, after the discovery of cattle on the track, to save the train and passengers from threatened danger, would not render the railroad liable, even though they might result in injury to the cattle." (*Owens v. R. R. Co.* 58 Mo. 386.)

The conflict of duty which is contemplated in these cases results from the fact, which appears to be conceded, that where a collision with animals is inevitable, the safety of the train demands that speed should be maintained or increased so as, by concussion, to insure the throwing of the animals off the track by the cow-catcher; such maintenance or increase of speed made to save the train is no evidence of negligence, but rather of extra care on behalf of the passengers and freight on the cars.

"The first and paramount duty to be observed when danger is apprehended from such obstruction [animals on the track] is the safety of persons and property on the train, or otherwise lawfully on the track, and as to such the law demands the exercise of the highest degree of care and diligence by the company and its agents. The next object of the attention of the agents of the company is the safety of their own property." (*Bemis v. R. R. Co.* 42 Vt. 380.)

the way of which the animals are, and the companies may, and in fact must, make their plans and arrange their time-tables upon the reasonable and legal presumption that other persons will perform all their legal obligations toward them, and, consequently, that the owners of domestic animals will keep them where they belong, and not suffer them to stray upon the track of a railway company, unless such owners are prepared to incur the legitimate hazards of such an exposure.¹

But the duty of the company to the public, being by the corporation duly performed, does not relieve it from all responsibility; there is another and further duty, second in importance and subordinate to that which it owes to its patrons and employees, to so conduct their business as to avoid doing needless injury to others; and when cattle are found to be in the way of a train, the employees of the company, who control the movement of it, should do all in their power to avoid running into them.²

¹ *Bemis v. R. R. Co.* 42 Vt. 375. "The use on land of engines and cars running on a railroad track at a high rate of speed, though dangerous, is a reasonable use of the land, because it is for a proper object and a highly beneficial purpose, and the danger may be avoided by proper care. There is, certainly, a risk to cattle running at large in the vicinity of an uninclosed railroad track, but this risk the owners of the cattle must take, unless they choose to avoid it by keeping their cattle within their own inclosures. If they do not choose to do this, they can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of the road, the capacity of its locomotive power, and the safety of the persons and property carried, shall, with due regard to the safety of persons and property in their charge, being the paramount consideration, exercise what in that peculiar business would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road. Where there is nothing in the running of a train, or in its rate of speed at a particular place and time, inconsistent with the general and legitimate conduct of the business of the railroad company, we cannot see how the occasion and necessity therefor can properly concern an owner of cattle running at large. He cannot properly discuss with the company the proper exercise of the discretion vested in its agents as to the time or occasion of running its trains, and has no right to bring forward its time-table and list of connections, and enter into an inquiry whether the rate of speed was greater than usual for a particular train at a particular place, and whether such rate of speed was necessary to make a connection, or avoid a collision, or for some other proper object." (*Central O. R. R. Co. v. Lawrence*, 13 Ohio St. 71; *Kerwhacker v. R. R. Co.* 3 Ohio St. 173.)

² *Ind. Etc. R. R. Co. v. McBrown*, 46 Ind. 229; 1 *Redfield on Railways*, 475; *Louisville Etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Ill. C. R. R. Co. v. Baker*, 47 Ill. 295. "There is no strict rule that the engineer, on seeing the danger, is bound to slacken the speed of the train. His first duty is to provide for the

That such care may be taken, the engine-driver must keep strict and constant watch, and that he may do so, all objects which, not being directly upon the track, yet obstruct his vision, must be removed.¹

§ 88. Laws are for the public benefit.—Statutes imposing responsibility upon railway companies for injury to live-stock, are for the benefit of all persons, and not alone for the protection of him through whose land the road runs.

The common law and provisions of the statutes providing for the building of fences by the railroad companies in England appear only to be intended for the protection of those owners of live-stock whose lands lie immediately contiguous to the roadway; and the obligation on the part of the company to make and maintain fences, applies only as against the owners or occupiers of the adjoining close.²

But the benefit of the American statutes is, as a general rule, not confined to owners or occupants of land immediately adjoining a railroad, but extends to all owners of animals,³ although

safety of the passengers and property in transportation; his next, to secure the property of the company from danger. Subordinate to these duties, he is bound to use ordinary means, such as sounding the bell or whistle, or other measures appropriate to the case, to avoid doing needless injury; and if he does this, the company are not liable." (*Bemis v. R. R. Co.* 42 Vt. 375; *Jeffersonville R. R. Co. v. Chenoweth*, 30 Ind. 366.)

¹ *Ruiford v. R. R. Co.* 43 Miss. 233; *Cecil v. R. R. Co.* 47 Mo. 246; *Watson v. R. R. Co.* 7 Phil. (Pa.) 249; *Nashville R. R. Co. v. Comans*, 45 Ala. 437; *New Orleans R. R. Co. v. Field*, 46 Miss. 573. "In an action to recover the value of cattle alleged to have been killed on defendants' road by their locomotive and train, it appeared that the cattle could have been seen on the track by the engineer, if he had been on the look-out, for a distance of more than half a mile; yet he made no effort to slacken the speed of the train. Held, it was gross negligence, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company." (*Chicago R. R. Co. v. Barrie*, 55 Ill. 226.)

² *Redfield on Railways*, 465; *Towns v. Cheshire R. R. Co.* 1 Foster, 363; *Sharrod v. London Etc. R. R.* 4 Exch. 580; 8 and 9 Vict. Chap. 20, Sec. 68; *Ricketts v. E. & W. I. D. Co.* 12 C. B. 160; *Jackson v. R. R.* 25 Vt. 150; *M. S. & L. R. R. Co.* 14 C. B. 243. Held, "that a railway was not bound to fence against cattle straying upon a highway running along the railway, and that they are not liable for any injury sustained by cattle in getting from such highway upon the railway through a defect of the fences maintained by the company; although the cattle strayed upon the highway without any fault of the owner." (*Brooks v. N. Y. & E. R. R. Co.* 13 Barb. 594; 2 Roll. 289; *Toledo R. R. Co. v. Weaver*, 34 Ind. 298.)

³ *Corwin v. N. Y. & E. R. R. Co.* 13 N. Y. 42. "The duty imposed by the statute upon railroad corporations is not limited to the maintenance of fences and

in some of the older States the common-law rule obtains, that a man must fence his cattle in, or abide the consequences of their straying abroad.¹

On the other hand, the common-law rule that the owner of domestic animals must fence them in, is not of universal application in the United States. It is generally admitted to be inconsistent with the customs and necessities of the people there, and the common law was adopted so far as it was adapted to the wants of the people when the State constitutions were formed; hence this rule has come to be rather an exception,² and result-

cattle-guards, as against the animals of adjoining occupants, or those lawfully in the highway." (*New A. R. R. Co. v. Ashton*, 13 Ind. 545; *New A. Etc. R. R. v. Bishop*, 13 Ind. 566; *Brown v. Providence Etc. R. R.* 12 Gray, 55.)

¹ *Corwin v. N. Y. & Erie R. R. Co.* 13 N. Y. 47. At common law, the owner of cattle must keep them upon his own premises; and if he did not, they were trespassers when they strayed upon the land of others, and the owner was guilty of negligence, when, by failing to keep them on his premises, he suffered them so to stray. When his negligence contributed to the occurrence by which the cattle were injured, the owner could not recover on the ground of negligence of others. (*Eames v. Salem R. R. Co.* 98 Mass. 560.) But one whose animals are in a field adjoining the railroad, by license of the occupier, is himself an occupier. (*Dawson v. Midland R. Co.* Law Rep. 8 Exch. 8; *Midland R. Co. v. Daykin*, 17 C. B. 126; *Rust v. Low*, 6 Mass. 94; *Thayer v. Arnold*, 4 Met. 589; *Little v. Lathrop*, 5 Green. R. 356; *Bush v. Brainard*, 1 Cow. 78; *Holladay v. Marsh*, 3 Wend. 142.)

² "The owner of cattle is under no obligation to keep them on his premises. If, however, he should permit them to run at large, and they should go upon the track of a railroad and be injured unavoidably, through no want of diligence or care on the part of the agents or servants of the railroad company, he would be without redress." (*German v. P. R. R. Co.* 26 Mo. 441.)

"It is the law in England, and in some of the densely populated States in this Union, that the owners of cattle shall keep them inclosed, and if they stray therefrom they are trespassers, and the owners are guilty of negligence. But such is not and never was the common law in Missouri. It is opposed to the policy of the State in its present condition, and whenever it has been attempted to be enforced, it has met with resistance and condemnation." (*McPheeters v. H. & St. J. R. R. Co.* 45 Mo. 26.)

"No conviction has more thoroughly occupied the public mind than this, and nothing would sooner arouse the attention of the community than the apprehension that the old rule of the common law was to any extent to be revived. As early as 1808, the act for regulating inclosures became a law, and from that time the people have rested in the belief that they incurred no responsibility and were guilty of no fault or negligence toward others in turning loose their cattle, unless when their cattle trespassed upon fields inclosed in the manner prescribed by law. An injury to cattle, unless trespassing upon fields legally inclosed, was redressed without any inquiry whether the cattle, when they received the injury, were on the land of the owner or that of the individual committing the wrong." "The range, as it is called, is a source of wealth to many of our citizens, and nothing would induce them more resolutely to oppose the location of a railroad in their vicinity than the knowledge that it would impose on

ing therefrom, there being primarily no obligation on the part of the owner of live-stock to inclose them, persons on whose premises they might stray are obliged to protect themselves from their incursions. From this reasoning, it would appear that where the common-law rule does not control, the company, apart from statutory provision, is compelled to fence or pay for the loss of cattle which, by reason of its not fencing, get upon its roadway and are run into, unless it appears that the accident could not have been avoided by the exercise of ordinary care, reference being had to the circumstances,¹ and the burden of proof generally is upon the plaintiff to establish negligence, where the statute does not, in terms, make the fact of the collision *prima facie* evidence thereof.²

them the obligation of keeping their cattle and stock in inclosures. That obligation would not be confined to those in the immediate neighborhood of the road, for cattle, when not confined, frequently stray much further than would be supposed by those not acquainted with their habits. Many farmers have a sufficiency of uninclosed land for the pasturage of their cattle. Shall they be bound to inclose it at a peril of a suit for an injury caused by their cattle which may cost them their estates? The other interests of the State are not all to be made subservient to the railroad interest. That interest enters into competition with other pursuits, with the advantages and privileges the law confers upon it, but there is nothing in it of so over-shadowing a character that all other pursuits must yield to it. There are none who are not impressed with the importance of railroads, and their great utility as the medium of intercourse and commerce. No State that will keep pace with the age but must build and encourage them. But we should be cautious how we clothe them with privileges and immunities, at the cost of the rest of the community, which may enkindle a spirit hostile to their existence and seeking its gratification in their destruction."

Gorman v. P. R. R. 26 Mo. 446-7. But under the law of Missouri, as it now stands, a railroad company is not responsible for stock injured by trains when such killing takes place at a part on their road where it is not fenced, and where it does not pass through or along inclosed or cultivated fields or inclosed prairie lands, unless actual negligence be proven. (*Musick v. A. & P. R. R.* Co. 57 Mo. 134.) "A railroad company is liable for injuries to stock caused by its negligence where the plaintiff has contributed to the injury no further than merely permitting his stock to run at large." (*Searles v. R. R. Co.* 35 Iowa, 499.)

¹ *Ill. C. R. R. Co. v. Baker*, 47 Ill. 295. "The mere fact that an animal is at large by the" permission of the owner, and is run over and killed by the locomotive, does not justify the conclusion that the injury was occasioned by the willful act of the owner, and in an action against the railroad company to recover for the loss of the animal, the burden of proof to show a willful act on the part of the plaintiff rests on the railroad company. (*Stewart v. R. R. Co.* 32 Iowa, 561; *Memphis R. R. Co. v. Orr*, 43 Miss. 288; *New Orleans R. R. Co. v. Field*, 46 Miss. 573; *Id.* 578.)

² *Georgia R. R. Co. v. Anderson*, 33 Ga. 110; *Georgia R. R. & B. Co. v. Munroe*, 49 Ga. 373; *Cleveland v. Q. R. R. Co.* 35 Iowa, 220. "In an action against a railroad company to recover for stock killed by a passing train, the burden is

§ 89. As to gates and other openings in fences along railways, the duty of the company is to keep them closed.

The duty by statute imposed upon railroad companies to build fences along the sides of their roadway, so as to prevent animals from straying upon the track and being injured, in conjunction with the further obligation, which, in certain cases, is imposed upon them, of making such crossings as will permit farmers to get, with their wagons or live-stock, across the track, makes a necessity for gates or bars in the fences, and the question of how far the company can be held liable for injury to domestic animals which get upon the track by reason of these gates being left open, or bars down, may become matter of interest.

The general rule deducible from the authorities is, that if such an opening in the fence is left as that cattle may stray upon the track, whether it be by gate or bars, with the consent of the company or without it, and the same is left open an unreasonable length of time, the company is liable for injuries to live-stock which may enter through the breach upon the roadway and track, after the agents and employees of the company have had reasonable time to shut the gate, put up the bars, or otherwise close the opening.¹ Nor does it make any difference that none of the employees of the company became aware of the fact that the fence was broken, bars down, or gate left open; it is the duty of the company to not only build, but maintain, the fences prescribed by the statutes, and for dereliction in the performance of that duty the company is liable.² While the

upon the plaintiff to show either that the killing or injury was done at a point where the company had the right to fence and had not fenced, or that the company were guilty of negligence in causing the injury." (*Comstock v. R. R. Co.* 32 Iowa, 376.)

¹ *McDowell v. R. R. Co.* 37 Barb. 196; *Munch v. R. R. Co.* 29 Barb. 647; *Brown v. R. R. Co.* 21 Wis. 39; *Chicago Etc. R. R. Co. v. Reid*, 24 Ill. 144; *Bartlett v. R. R. Co.* 20 Iowa, 188; *Ind. Etc. R. R. Co. v. Snelling*, 16 Ind. 435.

"But a railroad company is not liable for stock killed on their track, unless they have actual or implied notice that the fence was down, or the gate open, and a reasonable time thereafter to put the same in proper condition." (*Aylesworth v. R. R. Co.* 30 Iowa, 450; *Dewey v. R. R. Co.* 31 Iowa, 373.)

² *Ill. C. R. R. Co. v. Arnold*, 47 Ill. 173. "Where a cow entered the close of another through an insufficient fence upon the highway, and passed from thence through a space made for bars, and used as a farm-crossing, upon the railroad track, and was killed, and it was proved that the bars had been left down for a period

companies are not required to keep such guard over their roads as would immediately make them aware of a breach as soon as it occurs, and immediately to close it, still the law is such as to impose upon the corporation the obligation of keeping employed such a number of men, to be over the roadway daily in such manner as to discover breaches and openings in their fences, and close them before danger results from the breach or opening, allowing animals to get in the way of trains.¹ Where the defect or opening in the fence results from the negligence of the owner of the stock injured, the company cannot justly be held responsible.²

§ 90. Reasonable diligence only is imposed on railroad companies in keeping gates shut at farm-crossings. While the law does impose upon railway companies all reasonable diligence in maintaining their fences, it requires of them no more than reasonable and ordinary care in the matter of so keeping up their fences, the gates closed and bars up, as that cattle will not be likely to get in upon the roadway. They are allowed sufficient time to repair damages to their fences, occurring by storms or other causes, and are not called upon to exercise extraordinary care or diligence in the premises, such as the

of three months: held, that the statute required the railroad company to 'erect and maintain' a sufficient fence, of which the bars were a part, and that the company were guilty of negligence for allowing them to remain down for so long a time." (*Great W. R. R. Co. v. Helm*, 27 Ill. 199.)

¹ *Chicago R. R. Co. v. Harris*, 54 Ill. 523. "In an action against a railroad company to recover for injuries to horses inflicted by a train on defendant's road, where it appeared that the horses passed upon the track through an open gate at a farm-crossing, the company, having permitted the gate to remain open for a week previous to the accident, were regarded as guilty of such negligence as rendered them liable."

"A gate in a fence, which the defendant is bound to keep in repair, is to be regarded as a part of the same." (*Eates v. R. R. Co.* 63 Me. 308.)

² *Shearman & Redfield on Negligence*, 459; *Poler v. R. R. Co.* 16 N. Y. 476; *Perry v. R. R. Co.* 36 Iowa, 102. "A railroad company is required to use reasonable care and diligence in keeping up bars leading through the fence inclosing its right of way, and if, by reason of its failing to use such care, stock passes on to its road and are injured, it is liable in an action therefor. But it would not be liable for such injuries if the bars through which the cattle passed on to the track had been left down by the plaintiff or a third person, unless they had continued for such a length of time or under such circumstances in this condition as to justify the inference of negligence on the part of the company in not seeing and putting them up." (*Ill. C. R. R. Co. v. Arnold*, 47 Ill. 173.)

maintenance of guards through the night to prevent injuries to their fences, and, if the fence is generally sufficient, the fact that in one place it is not so as to turn stock is no proof by itself that the injury resulted from the company's not having repaired the weak spot or closed the gap; the burden of proof that the neglect of the company is the cause of the injury being on the party complaining of the injury, he must show that the animal got through the gap or over the weak place, the value of the testimony of the existence of such gap or weak spot being for the determination of the jury.¹

¹ Shearman & Redfield on Negligence, 461. "Only reasonable or ordinary diligence is required of railroad companies in the maintenance of their fences. They are allowed a reasonable time for repairs, and are not bound to keep watch all night, for example, to guard against injuries to their fences. If within such reasonable time the fence is repaired, the company is not liable, under the statute, for cattle entering through the breach. If the fence is for the most part maintained, but is defective in particular places, the owner of the injured cattle must give some proof that they entered at a defective part of the fence." (Lemon v. R. R. Co. 32 Iowa, 151; Chicago Etc. R. R. Co. v. Barrie, 53 Ill. 226; Ill. C. R. R. Co. v. Dickerson, 27 Ill. 55; Morrison v. R. R. Co. 32 Barb. 568.)

But in some States a *high degree* of diligence is required. (Antisdel v. R. R. Co. 26 Wis. 145.) The latest cases, however, are to the effect given in the text. (Perry v. R. R. Co. 36 Iowa, 105.) "Having built the fence as the law requires, the leaving of bars therein down by some third person, and that through them cattle have strayed upon the track and been injured, does not make for plaintiff a *prima facie* case. He must go further, and show that the defendant was guilty of negligence in permitting them to remain down. Having built the fence as the law requires, the leaving of bars therein down by some third person, over whom defendant has no control, is not an act which renders defendant liable. That liability, if it exists at all, arises from its conduct after the bars were left down, either in failing to put them up, after acquiring knowledge that they were down, or in neglecting to use reasonable diligence to ascertain such condition. And the burden of proving these facts is upon plaintiff." (Aylesworth v. R. R. Co. 30 Iowa, 459; Muldowney v. R. R. Co. 32 Iowa, 176.) And it is to be observed that, in some of the States, where the common-law rule as to keeping animals within inclosures prevails, a railroad company is not liable for animals injured by its trains where the animals were not lawfully in the land adjoining the roadway and thence got upon the track through a gap in the fence. (McDonnell v. R. R. Co. 115 Mass. 564.)

Part III.

ANIMALS.

CHAPTER VII.

HIRE OF ANIMALS.

- § 91. Contract of hire of animals.
- § 92. Special covenants by the lettor of animals.
- § 93. Warranty of title implied by letting animals.
- § 94. The hirer of animals must feed and care for them.
- § 95. Extraordinary expenses incurred in care of hired animals.
- § 96. When hired animals are stolen, loss falls on owner.
- § 97. Negligence sufficient to charge hirer for loss of animals.
- § 98. Hirer of animals liable for loss from servants' negligence.
- § 99. Hirer of animals has a special property in them.
- § 100. If the hirer of animals abuse them.
- § 101. Distinction between hirer and borrower of animals.
- § 102. Borrower of animals restricted to stipulated use of them.

§ 91. Contract of hire of animals.—The hiring of animals implies an obligation on the part of the lessor to him who, by the contract, is to have the use thereof, that for the period of the bailment the hirer is to have the use and enjoyment of the property to the extent of the contract, and on the part of the hirer to fulfill all such engagements as by express terms he has agreed to, or are by law imposed on him.

On the part of him who hires out the animals, it is in effect stipulated that he is to deliver them to the hirer; to refrain from every obstruction to the use of them by the hirer during the period of the bailment; to refrain from doing anything which should deprive the hirer of the benefit contemplated in the transaction; to warrant the title and right of possession to the hirer, so that he may have the full and unobstructed use of the property, and to warrant the animals to be free from any fault inconsistent with the proper use of them, regard being had to the purposes for which they are let.

The delivery of the property must be to the hirer, unless otherwise agreed; and this should be with all suitable and requisite appendages and equipments, in view of the purposes

of the hirer in taking the same; as, if a horse is let to ride, it should also be with a suitable saddle and bridle.¹

§ 92. Special covenants by the lettor of animals.— On the part of the lettor of animals, the covenants which the law implies to have been made by him are such that he must deliver to the hirer the subject of the bailment in proper condition, and with suitable equipments for the purposes of the service involved, and if he fail to do so an action will lie for a breach of the covenant. He must deliver to the hirer the animal in the condition contemplated by the parties in making the contract, and if by accident, unavoidable casualty, or otherwise, the animal has become injured or unsuited to the employment, the hirer is not bound to take it, but may insist upon the contract being rescinded.

From principles of justice it results that the lettor should restrain from all obstructions to the hirer in the use of the property for the purposes of the bailment; the only practical questions involved in the consideration of this branch of the subject, therefore, are what amounts to such obstruction.

Resumption of the property, or any other act by which the lettor voluntarily deprives the hirer of it, is a clear case of violation of duty, and so it may be said of any other act which prevents the hirer from using the same as contemplated by the parties when they made the contract; as, if the lettor sells the property, or suffers it to be attached so that the hirer loses the anticipated use of it.

In such cases there is a clear violation of his implied contract.²

§ 93. Warranty of title implied by letting animals.— An implied warranty of the title and right of possession to

¹ Story on Bailments, p. 317; Pothier Contrat de Louage, n. 53; 1 Domat Civil Law, by Strahan, Vol. 1, p. 264-5. This distinguished author, in his chapter on the Duties of the Lessor, says: "The lessor is bound to procure the free use and enjoyment of the thing leased, to the person to whom he lets it out; to deliver the same to him in a condition to serve the use for which it is hired; and if the lessor does not deliver the things in good condition, or such as he promised to do, the lessee may recover his damages; and he will be still more entitled to this relief if the proprietor himself, or the person for whom he is answerable, hinder the tenant from enjoying the property leased."

² Pothier Contrat de Louage, n. 86, 87; 1 Domat, Civil Law by Strahan, p. 265, B. 1, Tit. 4, Sec. 3, Art. 4.

the hirer results from the general reasoning applicable to the subject. A vendor of personal property, which is in his possession at the time, by his sale, at a fair price, is deemed to warrant the title to his vendee;¹ and so, having leased the same, it would appear *a fortiori* he agrees to maintain the possession which, by letting, he has disposed of for the term of the lease.²

This applies, of course, only to the *legal* claims of third persons to disturb the enjoyment of the hirer of the animals leased, because for any wrong doing of a third party, by which the hirer's possession is disturbed, he must look to the law for his redress against the author of the trouble. It would be, by far, too severe a rule to impose upon the lettor the responsibility of the wrongful acts of all persons against the hirer, as that would amount to a peculiar warranty of the virtue of the whole human race. For the wrongful acts of third parties the hirer has always his remedy against them, and on this he must rely.³

§ 94. The hirer of animals must feed and care for them.

—The expenses incurred in keeping a hired animal in suitable condition for use, regard being had to the object in view, under the civil law fell upon the lessor, and that the necessary disbursements should be made by the bailor has sometimes been considered to be the common-law rule in the premises,⁴ on the

¹ 2 Kent's Com. 478.

² 1 Domat, p. 265, Sec. 3, Art. 2: "If the tenant is expelled by an eviction, the lessor is liable in damages for the interruption of the lease; for although this be a kind of casualty, yet the lessor is, notwithstanding, bound to procure a free and undisturbed possession of the thing to the tenant, and to put a stop to all claims made by any other person to the thing that is let, in the same manner as the seller is obliged to do with respect to the thing he sells."

³ Story on Bailments, 387: "For the wrongful acts of third persons, the hirer has his remedy against them."

⁴ Story on Bailments, Sec. 388, citing 2 Kent's Comm. Sec. 586. This citation does not quite sustain the character ascribed to it by Story. The language in the section of Kent's Com. is: "The lettor, according to the civil law, is bound to keep the subject in suitable order and repair, and to pay for extraordinary expenses necessarily incurred upon it. But the extent of the obligations of the lettor under the common law, on the point of repairs and expenses, remains to be defined and settled by judicial decision." Such is the opinion expressed in the latest (12th) edition, in 1873. In *Harrington v. Snyder*, 3 Barbour, 380, Snyder let a horse to Harrington, and it was known to both parties that the horse was lame. A price was fixed for the use of the horse, and Harrington

reasoning that an agreement on the part of the lettor to bear these expenses arises by implication from the fact that the use and enjoyment of the thing leased cannot be had by the bailee unless it is not only delivered to him, but maintained in the condition proper and meet for its use. Such is not, however, the rule to be deduced from the decisions of the English Courts, the general tendency of which is that, in the absence of all stipulations or customs to the contrary, the hirer must keep in good order the property which is the subject of the bailment.¹

§ 95. Extraordinary expenses necessarily incurred in the care of a hired animal must be borne by the lettor ;² but the hirer should inform the lettor of the facts as quickly as the circumstances will admit of. As in a case where a hired horse is taken sick on a journey, without the fault of the hirer, the nec-

said the lameness made no difference to him if the horse performed his journey. The journey which was to be performed, and the length of time which the hirer expected to be absent, were expressly agreed upon by the parties.

The horse performed the journey to the place of destination without apparent injury. On his return he became too lame to proceed, was left at a public house, and there kept, fed, and doctored for several days.

The Court held that the expenses incurred at the public house in so keeping, feeding, and doctoring the horse, should be borne by the lettor, and in the decision the Court says that it is the duty of the lettor to keep the property in suitable order and repair for the purposes of the bailment.

It is laid down as a rule by Pothier, that where a horse is let to one, on hire, to be kept by him for a certain period, the hirer is understood to be bound, according to the common usage, to pay for his shoeing during that time. But it is otherwise if a person let his coach and horses to another for a journey, to be driven by the servants of the lettor, for in such a case the horses are under the care of the servants, and the lettor is to pay for their shoeing. (Pothier *Contrat de Louage*, n. 109, 129, 159.)

This reasoning is not deemed quite sound in all respects, as it would, from the general rule that the hirer should keep the property in such condition as to fulfill the requirements of the bailment, result, that even in the instance first put, where no servant went along, the horse ought to have been, at the outset, on the journey, properly shod by the hirer, and if by accident in usual wear they were knocked off or worn out on the journey, it is not apparent, under the rule, why the lettor should not bear the whole expense of shoeing.

¹ Evidently the common-law rule in the premises differs much from that laid down by Pothier: the lettor, unless there is an express agreement to that effect, is not bound to repair, vide the decisions of the English Courts.

Pomfret v. Ricroft, 1 Saunders, 321-2; *Countess of Shrewsbury's Case*, 5 Rep. 14; *Horsefall v. Mather*, Holt's N. P. 7; *Walton v. Waterhouse*, 2 Saund. 422; *Taylor v. Whitehead*, 2 Doug. 745.

² Kent's Com. Sec. 586; Story on Bailments, Secs. 389, 391; *Harrington v. Snyder*, 3 Barbour, 380.

essary expenses incurred in caring for him should be paid by the lettor, and this whether the horse recovers, or dies of the malady.¹ These expenses, if paid by the hirer, may be recouped against a claim of the lettor for such service as the horse had performed before becoming disabled.

The risk of accidents to a hired animal is also to be borne by the lettor, and so long as the hirer exercises ordinary care, prudence, and skill, he is not responsible for damages which result from causes beyond his control. Damage happening to property let, without the default of the hirer, and while it is employed in the use for which it was hired, must be sustained by the bailor. The bailee, when called upon for the property, at the end of the time for which he has hired it, must deliver it, or account for his default by showing a loss of it by some violence or accident, which by ordinary care he could not have prevented.²

¹² Kent's Com. 587; *Conwell v. Smith*, 8 Ind. 530; Conwell being the owner of a jack, *farmed* him to Smith for a standing season, for certain hire specified in the contract; the animal became diseased, and it was shown that this had been caused by his having been poisoned, and also that his spermatic cord had been punctured by some sharp instrument, from which it resulted that the animal became impotent; but it was not shown that defendant had any connection with the injuries inflicted on the jack.

It was held that the loss fell upon the bailor, under the general rule.

In Iowa, a farmer having no work which would, in winter, afford employment for his mare, agreed with his neighbor that if he would he might have the use of her through that winter season, for her feed and shelter; the proposition was accepted, and the animal was turned over and used by him; but during the winter she met with an accident and died; it appeared that she had had fair attention and care, and that she was lost through no negligence or want of ordinary care. Held, that the lettor, not the hirer, must stand the loss, and that the arrangement being for the mutual benefit of both parties, it should be regarded as an ordinary hiring, the care and feed being in lieu of price of hire, and should follow the general rule. (*Chamberlain v. Cobb*, 32 Iowa, p. 162.)

Damages happening to property let to hire, without the default of the hirer, and while it is employed in the use for which it was hired, must be sustained by the bailor. (*Miller v. Salisbury*, 13 Johns. 211.)

In another case, (*Edson v. Weston*, 7 Cowen, 278,) defendant hired and received from plaintiff a horse, the property of Fowle, left by him, Fowle, in pledge with Edson for securing payment of a debt; defendant agreed to return him to the pledgee, Edson; while defendant so had the property it was taken from him by the constable on a suit against Fowle, the pledgor, and sold. Held, that the lettor, Edson, must not look to his bailee to bear the loss, but, the taking by the constable being a thing beyond the control of the hirer, he was exonerated. (Quere: should he not have notified the pledgee?)

² See Ante, Note to Sec. 94.

§ 96. When hired animals are stolen, the loss falls on the owner.—If a theft of hired animals is committed, and thus the animals are lost while in the possession of the bailee, who has hired them, the rule remains the same; if no negligence or lack of *ordinary* care has given to the theft peculiar opportunities to rob, the loss falls still upon the lettor; the rule for the measure of requisite care to clear the hirer being ordinary care and precaution, such as a man of average prudence would devote to the guarding of his own similar property. The promise, it is true, is to safely keep, and, in due time, return the property, but, under the rule, the understanding of such a promise would be deemed to be that the hirer would use due diligence and care to prevent loss or accident; and there is no breach of trust if, notwithstanding such care, the animals should be stolen.¹

¹Field v. Brackett, 56 Me. 123. The facts of the case, given in the opinion, are that the plaintiff hired out to defendants his wagon, to be used by them for a month; it was admitted by defendants that they made a verbal agreement that at the end of a month they would return to plaintiff the wagon in good order, etc.; but they alleged and proved that it was stolen from them while they were in the exercise of ordinary and proper care of it; that they have never been able to find or recover the same, though to that end they had used all care and diligence.

The learned judge (Barrows) who wrote the opinion states and logically sums up the proposition and reasoning involved, in a style more earnest and free from wearisome legal phraseology than is commonly met with.

Placing himself *en rapport* with the parties and the transaction, he thus states the probable arrangement. On the part of the hirer, "How long do you want it" (the wagon)? "A month," is replied. "Will you bring it back in good shape in a month?" "I will." Similar questions and answers might and probably would pass, in most cases, between neighbors negotiating such a transaction, without either the lettor or the hirer supposing that any special obligation (beyond that which the law implies on the part of the hirer, to be guilty of no negligence, and to return at the time appointed, in as good order as when received, ordinary wear and tear, and casualties, for which no blame could attach to the hirer, excepted) was assumed or intended to be assumed. I carry my watch to a watchmaker to be repaired. "When can I have it?" "In a week." Here is the same verbal agreement, and upon a like consideration as that alleged in the case at bar. Yet I do not understand that the watchmaker assumes any liability for safe keeping, different from that which the law would impose, if he said nothing about the return of it to me. When he tells me I shall have my watch in a week I do not expect him to add, in good set phrase, "provided my safe is not robbed in the meantime." That is understood between us.

To the same point, Foster v. Bank, Etc. 17 Mass. 478; Petty v. Overall, 42 Ala. 145. A watch and chain were deposited by plaintiff with defendant as security to indemnify him against an appeal bond, which he had signed for plaintiff; these articles, with property belonging to himself, his wife, and daughter, were

Anything more than this would amount to an insurance of the property, which cannot be *presumed* to have been intended; to establish such an insurance an express agreement, founded upon adequate consideration, must be shown.

§ 97. Negligence sufficient to charge the hirer for injury to or loss of hired animals.—What constitutes negligence or want of skill, such as would charge the hirer with the loss of or injury to animals hired, depends somewhat on the circumstances of each case.

The general rule is that the hirer shall provide them with proper food, shelter, and care during the time for which, by the contract, he has them, unless there is some express understanding qualifying the agreement in this respect; and where no special engagement is shown, the law will, by implication, create such an one, and hold the hirer to it.¹

The hirer must use the animal in a careful, prudent manner, reference being had to its condition and capability, he being re-

stolen from defendant's house, and the question was whether, under the circumstances, the loss of the watch and chain by theft exonerates defendant, the pawnee, from liability therefor? The rule was declared to be that the liability of *such* a bailee, if the pledge be stolen, that he is not absolutely liable, nor absolutely excusable. If the theft is occasioned by his negligence, he is liable; if without any negligence, he is discharged, such a bailee being bound for ordinary care, and answerable for ordinary neglect.

The conclusion cannot be legitimately drawn that the theft of the watch and chain resulted from negligence on the part of the bailee. To the same point see *McEvils v. Steamboat Sangama*, 22 Mo. 187. But in *Brown v. Waterman*, 10 Cush. (Mass.) it was held to be the duty of the bailee to show that he used due precaution and took reasonable care of the property; this, however, should be taken only with reference to the general rule, that the burden of proof of negligence is on the bailor.

¹ Story on Bailments, Sec. 393.

In Massachusetts, Carr hired a horse of Edwards to make a specified journey, which he made; but, when he returned the horse, it was in a condition manifesting want of proper care, feeding, and attention, and finally died from the effect of the same. It was claimed that when at the end of the outward trip the horse was not properly fed and cared for, and that death resulted from this want of care. The Court declared the law to be that, "to entitle the plaintiff to recover, he must prove that the death of the horse was caused by the overdriving, or want of ordinary care on the part of the defendant," and that if plaintiff, after the horse was returned, neglected any proper care or treatment of the horse, and thereby contributed to the illness of the animal, so that the death of the horse was occasioned partly by the misconduct of the defendant, and partly by the negligence of the plaintiff, no recovery could be had against defendant. (*Edwards v. Carr*, 13 Gray, 234.)

sponsible only for failing in the exercise of that degree of care which prudent persons generally manifest in keeping, caring for, and using their own property of a similar character. He can only be made liable for such injuries as it is shown come from an omission of the prescribed diligence and exercise of judgment, or, in more technical language, for ordinary negligence.¹

If a man hires a saddle-horse, he is bound to ride it moderately, and give it such care, stabling, and feed as a man of common discretion would to his own. Doing this, he is not liable to any damage, should the horse be lamed, get injured, or become sick; and it would appear that he is not bound to show, in the first instance, that he is free from fault. The law presumes him to be so, and the burden of proof of culpable negligence, want of skill, or absolute ill treatment, devolves upon the lettor of the animal.²

§ 98. Hirer of animals liable for his servant's neglect.

—If from want of ordinary care the hired animal be injured or lost, whether such default be on the part of the hirer or of his servants intrusted therewith, or the children of the hirer

¹ Jones on Bailments, 88; Maynard v. Buck, 100 Mass. 40; Hayes v. Howard, 6 Geo. 213; Browne v. Johnson, 29 Texas, 43; Foote v. Sterns, 2 Barb. 526; Harrington v. Snyder, 3 Barb. 380, in which it was held (in an action on the case against the hirer of a horse for so negligently taking care of him that he became of no value) that the burden of proof of negligence was on the bailor; that it was not enough for him to show that he was injured while in the possession of and use by the hirer, but it must be shown that the injury was caused by the fault of the bailee.

² But where the loss occurs, and the hirer neglects or refuses to give any account of the cause, a presumption of negligence arises, which seems to cast the burden of proof on the hirer. (Logan v. Mathews, 6 Barr, 418; Bush v. Miller, 13 Barb. 482; Cummins v. Wood, 44 Ill. 416.) But a careful analysis of these cases does not disturb the rule cited in the text. The burden of proof may be on the plaintiff, but given a certain condition, viz., the hiring of the animal, its death or loss, and an utter refusal of the hirer to give the explanation of the facts and circumstances which he alone can be cognizant of, may well give rise to a presumption of negligence which he must rebut. This very establishment of the presumption is an assumption, in a certain way, of the burden of proof.

"The degree of negligence necessary to authorize a recovery against the hirer of a horse, which died during the bailment, is not gross negligence, but what is called ordinary negligence; and ordinary negligence is the omission of that diligence in the use and care of the horse which the generality of mankind use as to their own horses; and the omission of such diligence is called ordinary negligence." (Moore v. Cass, 10 Kans. 288.)

allowed to use or be about the same, the hirer is responsible. He is bound to use the animal with care and moderation, not to apply it to any other than the designated use,¹ or detain it for a longer period than that for which it was hired,² and at the end of the term return it to the bailor, or account for its loss by some violence, theft, or accident;³ but, when the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he was not to blame.

The value and character of the animal must be regarded by the hirer in ascertaining what is proper care. High-priced or delicate animals should, of course, not be classified with such as are commonly treated without special attention.

Care and negligence are relative terms; they are without precise definition, not susceptible of exact measurement, and what constitutes them, or either of them, can only be determined by taking into consideration the circumstances of each case. "The care must rise in proportion to the demand for it," is the language used by an eminent writer,⁴ and the rule cannot be more correctly stated.

§ 99. The hirer has a special property in the animal leased to him, for the purposes expressed or implied by the contract.⁵ He also acquires the exclusive right to the possession of it,

¹ *Duncan v. R. R. Co.* 2 Rich. 613; *Mayor v. Howard*, 6 Geo. 213; *Harvey v. Epes*, 12 Gratt. 153.

² *Wheelock v. Wheelwright*, 5 Mass. 104. The Chief Justice (Parsons) says: "The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover; for thus riding the horse is an unlawful conversion."

Swift v. Mosely, 10 Vermont, 208. Swift hired of plaintiff a farm with the cattle and sheep on it; during the term he sold the sheep and cattle. The action was trover for them against the purchaser. Held, that if the hirer apply the subject of bailment to a purpose different from that provided by the lease, his interest is determined, and the lettor is entitled to the property.

³ *Haines v. Little*, 28 Ala. 236. If a bailee for hire sells the goods without authority, the bailment is at an end. The sale does not carry to the vendee even the right of possession for the unexpired part of the term, but the bailor may maintain trover even against the bona fide purchaser. (*Loeschman v. Machin*, 2 Starkie, 311; *Cooper v. Willomatt*, 1 C. B. 672.)

⁴ 2 Kent's Com. 587; *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322.

⁵ *Jones on Bailments*, 85, 86; *Bac. Abr. Bailment "C."* In *Lee v. Atkinson*, Yelv. 172, it was held that, where one hired a horse to go to a certain place, and

may maintain an action for injury done to it, for any tortious disposition of it, or for any act of a third party which unlawfully interferes with this enjoyment of the use of the animal to the extent of the bailment.¹ The owner has no right to interfere with this possession of the hirer, or disturb him in the lawful enjoyment of the property during the term of the bailment;² nor can the animals be levied upon for the debts of the owner, in such manner as to interfere with the possession of the hirer;³ and even if, during the time for which the property has been let, it is redelivered to the owner, unless the contract be terminated, he is bound to return it to the hirer.⁴

§ 100. If the hirer abuse the animal, or otherwise violate the terms of the trust, it is a question not free from difficulty how far, if at all, his title and right of possession terminates.

The lettor does not absolutely part with the title, even temporarily; he may, as well as the hirer, maintain a suit against a stranger for injuries to or conversion of the animals;⁵ he still has the larger and more beneficial estate in the property, and it appears an anomaly that he cannot be allowed to protect his property from such treatment as is manifestly beyond and foreign to the purposes had in view in making the contract; it

the hirer found him upon a road to another place, entirely different from the one he should have taken, and manifestly on a journey differing materially from the one for which the horse had been hired, the owner should not be justified in taking the horse from the bailee; the misbehavior of the bailee, in riding to another place than that for which he had hired the animal, might be punished by an action on the case, but he had a certain property in the horse for the term of the bailment.

¹ *Ibid*; 2 Kent's Com. 586.

² *Hickock v. Buck*, 22 Ver. 149. This was trover for a mare and colt. The defendant leased a farm to plaintiff, and agreed to furnish him a pair of oxen and a horse, to carry it on, and the mare in question was furnished as and for the stipulated horse. Afterward, the plaintiff, without defendant's consent, took away the mare and sold her, without furnishing any other horse to work in her place. Held, that when, under the contract, defendant placed the mare on the farm, under the charge and for the use of the plaintiff, he, the plaintiff, having accepted her for the purposes in the contract specified, became bailee of the mare, coupled with an interest, and a right to detain her during the term of the demise; that he had the exclusive use and control of her during the term, and he could maintain trover against the defendant.

³ *Hartford v. Jackson*, 11 New Hampshire, 145.

⁴ *Roberts v. Wyatt*, 2 Taunt. Rep. 268; *Balford v. Flowers*, 11 Humph. 242.

⁵ *Bac. Abr. Trespass*, "C"; *Ibid*, Trover "C"; 2 Bl. Com. 396; *Gordon v. Harper*, 7 Term Rep. 9; *La Coste v. Pipkin*, 13 Sm. & Mar. 589.

seems, however, that the owner is bound to abstain from interfering with the enjoyment of the property, by the bailee, during the term, and he cannot justify a seizure of the thing by force from the personal possession of the hirer, whatever may be his right to retake it, if he can peaceably, wherever he can find it, under circumstances of danger to his property.¹

An improper use or abuse of the property, or employing it other than as agreed upon, would appear to amount to a virtual determination of the bailment, so that there would not seem to be any reason why the owner should not treat the bailee as a stranger, and retake the animal, if he can do so without violence; he certainly may maintain trover against the hirer therefor;² and, in one instance, where a mare, which had been hired, was badly treated, over-driven, and left ill, at a distance from the home of the lettor, the owner was not only authorized to go for and retake her, but was allowed all of his expenses in going to her, attending upon the animal, and bringing her home.³

Where the bailee converts the property to his own use, the

¹ Lee v. Atkinson, Yelverton, 172; Story on Bailments, Sec. 396.

² Ibid; Wilkinson v. King, 3 Camp. 335; Loeschman v. Machin, 2 Stark. 311; McLaughlin v. Lomas, 3 Strobb. 85; Paley on Agency, 78, 79, 80; Rotch v. Hawes, 12 Pick. 135. Trover for conversion of a horse. Defendant hired a horse to go from New Bedford to Fall River and back. He took the horse in the morning for the purpose of making this journey, and returned him to the owner, a livery-stable keeper, at night. Immediately after the return of the horse he was taken sick, and finally died of this illness. It appeared that defendant had ridden him much further than the distance agreed upon. And it was held that if a person hire a horse to go a certain distance, and he goes further, he is liable in trover for an unlawful conversion. (Homer v. Thwing, 3 Pick. 492.)

³ Graves v. Moses, 13 Minn. 335. In this case defendants hired a team—a stallion, mare, and carriage—to drive to a certain place and back. By bad treatment, over-driving, etc., the mare fell sick on the road, and was left at a roadside inn. One of the owners went to see after, care for her, and bring her home. The Court held that he who takes a thing to hire engages to use it well, care for it properly, and return it to the owner. If bad usage procure the loss of the property, the bailor may recover from the hirer the value of the property lost through his misconduct. And it is the privilege, probably the duty, of the lettor to use all reasonable exertions in a case such as this; to use all reasonable care, diligence, and skill, to save the animal's life, and to cure it. That for the trouble and expense he is put to in so doing, he may have judgment against him whose misconduct has caused the occasion therefor; and that the expenses and loss of time incurred, in going to and from where the sick animal was, should be included as a natural and necessarily incurred part of such loss and expense.

bailment is ended.¹ Thus, if a bailee for hire, for a specified length of time, sell the property before the expiration of the term, the bailment is thereby ended, and the owner may maintain trover, should the vendee refuse to deliver it to him on demand. Nor does it alter the case that the bailee, by his contract, had a right to purchase the property within the term at an agreed price.

§ 101. A borrower differs from the hirer of animals, in that he is held to a much more strict rule of care and responsibility.

Where a loan is gratuitous, when the lender derives no benefit from the transaction and looks for no reward, the bailee is bound to extraordinary care, and is responsible for injuries resulting from slight negligence on his part, or that of his employees, children, or guests.²

¹ *Sargent v. Gill*, 8 N. H. 325. See *Green v. Harris*, 3 Iredell, 210.

² *Jones on Bailments*, 64 et seq.; *Vaugh v. Manlove*, 3 Bing. N. C. 468, 475; *Phillips v. Condon*, 14 Ill. 84; *Scranton v. Baxter*, 4 Sandf. 8.

In *Bennett v. O'Brien*, 37 Ill. 250, the justice (Lawrence) says: "O'Brien let Bennett have the use of his horse without compensation. This gratuitous bailment imposed on the borrower the duty of extraordinary care." The animal died while in the possession of the borrower: it was held that the burden of proof was upon him to show that he had taken such care. (*Wood v. McClure*, 7 Ind. 155; *Eastman v. Sandborn*, 3 Allen, 594; *Carpenter v. Branch*, 13 Vern. 161.)

Green v. Hollingsworth, 5 Dana, 173; *Howard v. Babcock*, 21 Ill. 250. This was an action for debt. It appeared at the trial that plaintiff sold his farm to defendant, and loaned to him a pair of work-mares which were on the place. One of the mares died. Defendant proved that he had taken all reasonable and proper care of her. It was held that unless the defendant could show that the death of the animal was without his fault, and that he had taken extraordinary care of the mare, he would be liable for her value; that a slight degree of neglect in the care of an animal loaned would render the borrower liable for its loss or death.

A borrower of animals is, of course, bound to feed them during the time of the loan, unless an express arrangement to that effect relieves him from this duty, (*Hanford v. Palmer*, 2 B. & Bing. 359) and if the borrowed animal be returned low in flesh, the presumption would obtain that he had not done so, and the bailee be put upon proof would have to take the affirmative, and show that the falling off in condition did not result from any neglect on his part. (*Bray v. Mayne*, 1 Gow. 1.)

But if the loss or damage to borrowed animals occur through casualties which could not be foreseen and guarded against, or if they result from inevitable accident, the borrower is not liable. *Jones on Bailments*, 67; *Story on Bailments*, 240; *Watkins v. Roberts*, 28 Indiana, 167; in which the horse was loaned, and while in the possession of the borrower, without any fault or negligence on his part, it was taken from him forcibly by a detachment of cavalry

But the lender must not, therefore, be careless as to whom he loans his property; for he only has the right to expect such a capacity for care and skill as belongs to the age, character, and known habits of the borrower. He should not loan his spirited horse to a child or to a person known to him to be physically or mentally weak, or otherwise incapable of exercising due care, and if he do so it must be at his own risk; for the owner cannot reasonably expect greater care on the part of the borrower than he had a right to presume the borrower was capable of giving.¹

§ 102. Borrower of animals restricted to use stipulated.

—The borrower must not apply the animal to any other use or employ it upon any other work than that agreed upon with the owner.² He must not loan it, or permit any other person to use it in any way. Such a gratuitous loan is a *personal* favor to the bailee, and may well be induced by the faith that the owner has in his special capacity, skill, or judgment to place in him a reliance which he would in no other. It does not follow, because the owner is willing that one for whom he may be believed to entertain feelings of friendship should, for a time, use his animal, that he is so careless of his interests as to consent that any person whatever should do so, and it is not for the person favored to presume the consent of the owner to such a disposition of the property by allowing third persons to have the custody or control of it.³

soldiers of the army of the United States; this was held a good defense to the action of the lender against the borrower for the value of the animal.

¹ Jones on Bailments, 65; 2 Kent's Com. 574. "If a spirited horse be lent to a raw youth, and the owner knew him to be such, the circumspection of an experienced rider cannot be required, and what would be neglect in one would not be in another." So, in Story on Bailments, Sec. 237, it is said that the bailor in such cases, of loans to a weak or inefficient person, who is known to be such, or to persons who are young and without experience, may fairly be presumed to trust to the known habits, condition, or character of the bailee, and to content himself with that degree of skill, diligence, or ability which he is known to possess.

² The right to use the thing which is loaned is strictly confined to such purposes which were considered by the owner when he made the gratuitous bailment. Being without consideration, the will of the lender cannot be supposed to go to any further extension of the gratuity than that stipulated. (Story on Bailments, Sec. 232; 2 Kent's Com. 574; Wheelock v. Wheelwright, 5 Mass. 103.)

³ Story on Bailments, Sec. 234; 2 Kent's Com. 574.

In *Bingloe v. Morrice*, 1 Mod. 210, plaintiff loaned his horse to defendant to ride. He not only did so, but permitted the horse to be ridden by his servant; and, on complaint by the lender, the Court held that the borrower could not properly allow even his servant to ride the horse, as the favor was personal to himself, and he could not presume as to what the owner's wishes might be in the matter of his servant's using him; that the license was annexed to the person of the defendant, and he could not communicate it to another.

In his work on Bailments, Sec. 63, note 34, Mr. Jones thus states the rule: "The right of using the thing bailed is strictly confined to the use expressed or implied in the particular transaction, and the borrower, by any excess, will make himself liable."

In *Booth v. Terrill*, 16 Geo. 20, it was held that the borrower is bound to take good care of the thing loaned; to use it according to the intention of the lender; to restore it at the proper time, and in the proper condition; and that a loan being strictly gratuitous, no property passes, and the lender may terminate the bailment whenever he pleases.

In *Jones on Bailments*, Sec. 70, Note, it is said: "The loan is to be considered as strictly personal, unless, from other circumstances, a different intention may be presumed."

The leading English case appears to be that of *Bingloe v. Morrice*, 1 Mod. R. 210, in which trespass was brought by plaintiff against defendant for immoderately riding a mare which plaintiff had loaned to defendant. It appeared that not only had defendant used the animal, but had permitted his servants so to do. The Court ruled that "the license is annexed to the person, and cannot be communicated to another."

The case is badly reported, and the citations of it are not as clear as is to be desired; but that part of the decision quoted is clear enough, and forcibly states the rule, as given in the text. Although in this case, by Lord North, the point is made that there is a difference between loaning for a definite and an indefinite term; as, if the loan be for a certain term, the borrower has an interest in the horse for that time, and may permit his servant to ride; but, where the length of time for which the horse was loaned was not limited, he had no such interest as would justify him in having his servant ride the animal.

The force of the distinction does not appear, and it is probable that, in that part of the case, the reporter has misunderstood the judge.

CHAPTER VIII.

SALE OF ANIMALS.

- § 103. General rules in sales of animals.
- § 104. Sales made by minors.
- § 105. Sales made by married women.
- § 106. Sales made by insane persons and idiots.
- § 107. Contracts made by drunkards.
- § 108. Mutual assent of parties to a sale.
- § 109. Taking animals on trial.
- § 110. Fraud vitiates all contracts.
- § 111. Misrepresentations of material facts destroy the contract.
- § 112. Concealment of material facts.
- § 113. Statute of Frauds in sale of animals.
- § 114. Mistakes as to material facts in sale of animals.
- § 115. Let the buyer beware.

§ 103. General rules in sale of personal property.—

The sale of animals, and the laws in that behalf, involve a consideration of the general principles involved in sales of personal property. A sale only occurs when there is an absolute transfer of the property, for a price agreed upon by the parties.¹

All persons who are competent to contract may become parties to such sale, but it must be remembered that all are not so competent. In America, the exceptions to the rule that all persons may buy or sell personal property, are now practically reduced to infants, married women, idiots, lunatics, and drunkards. The other exceptions, as outlaws, aliens, seamen, and slaves, are either abolished, or are of so little practical importance as to justify us in disregarding them.

§ 104. Sales by persons not of age.—Children have, in all countries, and under all codes, been deemed incompetent to contract, before arriving at some definite age fixed by law, upon the hypothesis that, before arriving at this age, the judgment

¹ Story on Sales, Sec. 1.

and powers of discriminating are not properly matured, for which reason the law protects them from fraud or artifice. This age of legal maturity, throughout the United States, is generally that of the common law, twenty-one years, although in some of the States females attain their majority at eighteen.

Contracts with infants differ from those by adults, on both sides, in this: that where an adult makes a contract with one under age, the adult is bound, but the infant is not; while, where both parties are competent, both are, or neither is, held.¹ This right to avoid his contract by the child is, however, personal to himself; he alone can exercise it; no third person can take advantage of the infancy of one of the parties to avoid an agreement,² and the infant, when he becomes of age, may affirm his contracts, and thereby render them of full force, should he see fit so to do.³

§ 105. Married women are not legally competent to enter into contracts. By something more incomprehensible than "a legal fiction" the law makes it appear that when a woman marries she becomes bereft of reason and loses all capacity for the transaction of business; but so soon as death or divorce takes away her husband, she resumes her normal condition and power to act as a free agent.

That the commission of so natural an act as getting married really has this peculiar effect upon the woman is hardly probable, and the rule of this supremacy of the husband and incapacity of the wife in all business matters is but a relic of that barbarism which prevailed in the earlier days of the jurisprudence of our mother country, when brute force prevailed over reason, and might made right. It was consistent with the state of things then prevailing that man should hold his mate

¹ In *Thompson v Hamilton*, 12 Pick. 423, the Court says: "The rule in regard to the contracts of a minor, and which was established for his protection, is, that they are voidable, not void; they are valid as against the party of full age, but may be avoided by the minor." (Story on Sales, Sec. 21.) But in *Boyden v. Boyden*, 9 Metcalf, 521, it is said that if the infant, when he becomes of age, disaffirm the contract, it releases the other party also.

² *Nightingale v. Withington*, 15 Mass. 274; *Campbell v. Cooper*, 34 N. H. 66; Story on Sales, Sec. 21.

³ *Williams v. Moor*, 11 Mees. & W. 256; *Whitney v. Dutch*, 14 Mass. 457; 2 Kent. Com. pp. 234, 235.

in unreasoning subjection to his will, but now, when our higher civilization is best marked by the respect shown to women, it is an anomaly that they are yet regarded, when married, as being incompetent for the transaction of the most ordinary business, and cannot make a contract by which she is bound.¹

When the husband assents to his wife's acting in a business capacity he becomes liable for her acts and assumes her contracts,² but, this being an exception to the general rule, it is for the person who relies upon this assent to prove that the wife was acting under the authority of the husband.³ Where an express consent or authority has been given by the husband to his wife to act in or to conduct a negotiation, there is ordinarily but little

¹The rights of married women to hold property and dispose of it, and even to make some kind of contracts, have, of late years, been somewhat more justly recognized by legislation in certain of the States, but, as a general rule, the common-law disabilities still exist throughout the Union.

²*Montague v. Espinasse*, 1 Car. & P. 357; *Montague v. Benedict*, 3 Barn. & Cress. 635; *Atkins v. Curwood*, 7 Car. & P. 760; *Seaton v. Benedict*, 5 Bing. 30; *Emmett v. Norton*, 8 Car. & P. 510; *Spreadbury v. Chapman*, 8 Car. & P. 371; *Mizer v. Pick*, 3 Mees. & W. 481; *Lane v. Ironmonger*, 13 Mees. & W. 386; *Reid v. Teakle*, 13 Com. B. 627.

In *Sawyer v. Cutting*, 23 Vermont, 486, Mr. Frazier was sick, utterly unable to attend to his affairs, and, at times, not in his right mind; his wife took care of him, managed the farm, and conducted his business, but there had never been any distinct instructions from him to her so to do; a note, which Hindman had given to Frazier, became due, and the payee was ready to pay it; he did so to Mrs. F, the husband being too ill to either attend to the affair or know anything about it; she could not find the note, but afterward it appeared in the hands of a third party, who sued the maker on it; Hindman pleaded payment, relying upon the payment to the wife. The Court held that the power of the wife to act for or in the place of her husband depended solely upon the fact of agency; that, as a wife, she had no power, original or inherent, to bind the husband, and that, even when the husband is sick, unable to attend to business from any cause, or is away from home, the wife is not presumed to be his agent, nor is she clothed with any power or intrusted with any authority in relation to his affairs, other than that which is customary and usual to confer upon the wife, such as the incurring of liabilities for necessities; that she has no discretion to act upon in such an emergency, and an arrangement made by her with reference to her husband's business affairs will not be binding or effectual.

In *Nitigale v. Withrington*, 15 Mass. 272, the learned judge, who speaks for the Court, says, in speaking of the covenant of an infant, who had indorsed a promissory note: "Such indorsement is not like one made by a femme covert, for a note payable to her becomes the property of her husband; her acts are absolutely void; whereas, those of an infant are voidable only." (*McClay v. Love*, 25 Cal. 367.)

³*Lane v. Ironmonger*, 13 Mees. & W. 386; *Reid v. Teakle*, 13 Com. B. 627; *Montague v. Espinasse*, 1 Car. & P. 357; *Seaton v. Benedict*, 5 Bing. 30; *Montague v. Benedict*, 3 Barn. & Cress. 635; *Story on Sales*, Sec. 53.

difficulty in establishing the fact, and where no such assent has, in terms, been given, the circumstances of the case may create a legal presumption that the wife has acted by his authorization.

Such a presumption arises when the wife purchases such articles as are necessities for herself or family; and if it appear that the wife, with the husband's consent, has acted for him in the matter of making contracts or attending to business for him in the same connection as that under consideration, it may also be presumed that she is still acting for him, with his knowledge and consent.¹

§ 106. Insane persons and idiots are incompetent to do any business; but if the lunacy be intermittent, and the mind is ordinarily in a sane condition, the party may contract while he is unaffected; and if the lunacy be only in respect to one certain subject, but extend no further, an obligation incurred in relation to a matter not involved in the monomania will be enforced; but the insanity, or even mental hallucination upon a special subject, being established, the burden of proof of the fact that, at the time of and in the transaction, the party was of sane mind, falls upon the person who deals with him.²

¹ *Bently v. Griffin*, 5 Taunt. 356.

² An eloquent argument, wherein was fairly discussed the rule in such cases, was made by Mons. d'Aqueseau, when advocate-general in the Parliament of Paris, in the case of the Prince de Contl. His language was: "It must not be a superficial tranquillity, a shadow of repose, but, on the contrary, a profound tranquillity, a real repose; not a mere ray of reason, which serves but to render its absence more manifest as soon as it is dissipated; not a flash of lightning, which pierces through the darkness, only to render it more thick and dismal; not a glimmering twilight, which connects the day and night; but a perfect light, a lively and continued radiance, a full and entire day, separating the two nights of madness which precede and follow it; and to adopt another image, it is not a deceitful and faithless stillness which follows or forebodes a tempest, but a sure and steady peace for a certain time—a real calm, a perfect serenity; in short, without looking for so many different images to represent our idea, it must not be a simple diminution, a remission of the malady; but a kind of temporary cure, an intermission so clearly marked that it is entirely similar to the restoration to health. And, as it is impossible to judge in a moment of the quality of an interval, it is necessary that it should last sufficiently long to give an entire assurance of the temporary re-establishment of reason. This period it is not possible to define in general, and it depends on the different kind of madness; but it is always certain that there must be a time, and that time considerable. These reflections are not only written by the hand of nature on the minds of all men, the law also adds its characters in order to engrave them more profoundly in the hearts of the judges." (2d Evans Pothier on Oblig. No. 3.)

It does not avail, as a defense against the plea of insanity, that the party dealing with a person of weak or diseased mind was not aware of the defect, as the rule is that there must be a mutual assent to make the contract, and one party was not able to comprehend, much less assent, to anything.¹

§ 107. Contracts made by a drunken person are also voidable; the law, not inaptly, regarding the drunken man as temporarily an idiot or insane person.² For a long time it was a matter of grave doubt whether such should be the rule when the drunkenness was voluntary, or should only be so when it had been purposely caused by the other party to the contract. The matter now, however, appears to be settled; the contracts of drunken persons are now regarded as voidable, though not absolutely void, without regard to how the drunkenness was occasioned.³ But the drunkenness must be so absolute and complete as to render, for the time being, the drunken person incapable of understanding the contract and assenting thereto.⁴

¹ *State v. Reddick*, 7 Kans. (1871) 143; *Carpenter v. Carpenter*, 8 Bush, (Ky.) 233. But see *Wilder v. Weakly*, 34 Md. (1870) 181.

² *Cory v. Cory*, 1 Ves. 19. "An agreement, reasonable in itself, and to settle family disputes, not set aside because the party was intoxicated, no advantage having been taken of it."

This case is much cited, and the decision is terse, viz: "As between strangers, a Court of Equity will not assist a person who has obtained an agreement from one who was intoxicated, or the other person to get rid of it." Hence, it appears that he who is sober is bound, while the drunken man is not. (*Phelan v. Gardner*, 43 Cal. 306.)

Stockley v. Stockley, 1 Vesey & Beames R. 30, was another case of settlement of family quarrels, where it was held proper to make such a settlement when one party was drunk, but that, apart from this exceptional class of cases, the rule was as in the text. (*Newell v. Fisher*, 11 Smedes & M. 431.)

Pitt v. Smith, 3 Camp. 33. It appeared that the defendant had become quite drunk before signing the agreement. Whereupon, Lord Ellenborough directed a nonsuit, holding that "an agreement signed by a person in a state of complete intoxication is void." (*Gore v. Gibson*, 13 Mees. & Wels. 623; *King's Ex. v. Bryant's Ex.* 2 Haywood's R. [N. C.] 591.)

³ *French v. French*, 8 Ohio, 214. The law now regards the fact of intoxication, and not the cause or author of it; and a contract made while the party is in such a state of intoxication as that he has not his ordinary discretion and judgment, will be set aside, although the other party had no agency in producing the intoxication. (*Barrett v. Buxton*, 2 Aikens, 167; *Story on Contracts*, Sec. 45; *Story on Sales*, Sec. 15.)

⁴ In *Story on Contracts*, Sec. 45, the rule of the measure and extent of the drunkenness requisite to be proved to annul the contract is as follows: "Such drunkenness must, however, be so excessive and absolute as to suspend the

The contract by one who is so intoxicated as to incapacitate him, being only voidable, it still has force and effect, although subject to the inherent defect. It may be avoided by the party and annulled by him, upon a proper exhibition of the facts which constitute the defect; but until so avoided by the party having the right to annul them, such contracts as are only voidable are generally of binding force and effect.¹

§ 108. Mutual assent of the parties to a sale must be fully established to sustain it; the minds of the buyer and seller must meet and agree. Such assent may be either express or implied,² but must be certain and definite, as an offer which is not clearly made and unequivocally accepted is no bargain, and may be receded from;³ so soon as it is assented to, the compact is complete, and may be enforced.

A proposal is not to be considered as a continuing one unless so made, expressly or by implication. To be made binding, it should at once be accepted; because, until the assent becomes mutual,

reason for a time, and create impotence of mind." Although it is true that a person who is only excited by drink—who is but in the condition of merriment from a social glass, to an extent which revives the spirits rather than stupefies reason, (Puffendorf, Book 3, Chap. 6, Sec. 4)—cannot generally avoid a contract on the ground of drunkenness, yet where it appears that he was so excited, and caused to be inebriated, even to the less extent, by the other contracting party, and advantage of his condition taken by that other party to urge, or over-influence him, he would be entitled to relief from his contract, on the ground of fraud practiced on him to his injury." (Id. Sec. 45a.)

¹ Drunkenness can constitute no defense, unless the party, on becoming sober, disavows the contract. (*Barrett v. Baxton*, 2 Aiken's Rep. 167.) "Intoxication only renders a contract voidable, and not void, so that the party intoxicated may, upon recovering his understanding, adopt it." (Story on Contracts, Sec. 45.)

² Story on Sales, Sec. 125. The assent may be given through an agent, and such consent will bind the principal, although the agent neglect to inform his principal as to what he had done. (*Booth v. Pierce*, 40 Barb. 117; *Reedy v. Smith*, 42 Cal. 245.)

³ Where the promise of one party is the consideration for the promise of the other, the promise must be concurrent, and bind both parties, to hold either. (*Tucker v. Woods*, 12 Johns. 187; *Northam v. Gordon*, 46 Cal. 582.)

But where a contract had been made, letters passing between the parties proposing, but not finally consummating, a change in the agreement, it was held that these subsequent deliberations as to the propriety of making a change did not vitiate the original assent to the contract. (*Alcott v. Boston St. Flour M. Co.* 9 Cush. 17.)

A refusal of the property at a stated price, held under advisement by the proposed purchaser, is not a contract, because of the want of mutual assent of the parties. (*Faulkner v. Hebard*, 26 Vern. 452.)

neither party is bound ; but where a custom prevails to the effect, or by the circumstances of the case it fairly appears that reasonable time to deliberate upon the offer was allowed, an assent given within such time will complete the contract, unless, in the meantime, the proposal is withdrawn.¹

The assent, also, may be either expressed, or it may be implied from the circumstances of the case ; and although mere ordinary silence would not generally indicate an assent, and complete the contract, yet if, by the terms of the offer, it is incumbent on him to whom it is made to express his dissent, and he fails to do so, or when his conduct in the premises is such as to indicate unequivocally that he accepts the proposition, his assent will be implied.²

§ 109. Taking animals on trial.—Where the owner of an animal allows the person who proposes to buy it time to try it before determining upon the offer of sale, he must return the property before the time expires, or his assent to the proposal may be presumed.³ There is nothing in such offer and acceptance of the use of the animal which can be treated by either party as a mere bailment for hire ; the owner of the animal would not be justified in claiming the value of the use of the animal while so in the custody of the other party, and the proposed buyer cannot keep the animal over the prescribed period of time, and shelter himself from the presumed acceptance of the bargain by offering to pay for the use of the animal during the time which he has retained it ; and when an offer is made, and the property allowed to be taken on trial, without any definite period of time being fixed, the law will limit it to a

¹ *Martin v. Black's Adms.* 21 Ala. 721 ; *Story on Sales*, Sec. 126 ; *Johnston & Lyon v. Fessler*, 7 Watts, (Penn.) 48 ; *Peru v. Tenner*, 1 Fairf. 185. A bargain should be regarded as closed when nothing remains to be done to give either party a right to enforce it ; where an offer is made in writing, by letter, the *presumption* arises that the offer is a continuing one until the letter is received by him to whom it is sent ; and so the offer is *presumed* to remain standing until it is expressly revoked ; whether the proposition was at a certain time open for acceptance, is a question of fact for the jury. (*Mactier's Adms. v. Frith*, 6 Wend. 103 ; *Faulkner v. Hebard*, 26 Vern. 452.)

² *Corning v. Colt*, 5 Wend. 263 ; *Train v. Gold*, 5 Pick. 379.

³ *Story on Sales*, Sec. 128.

reasonable length; and if the animal is not restored within a reasonable time, the assent to the purchase will be presumed.¹

§ 110. Fraud vitiates all contracts.—There can be no assent which is not given upon a fair understanding by the parties, free from imposition or mistake.² If duress, mistake, or fraud enter into the contract, it is not binding. A common definition of fraud is: "Every kind of artifice employed by one person to deceive another." Fraud is a fact to be passed upon by the jury, taking into consideration the circumstances of the transaction.

He who commits the fraud is, however, at the option of the other party, held to his contract,³ and he who has been defrauded may either acquiesce in or avoid the agreement, provided he does so within a reasonable time after he discovers the

¹ *Ibid*; 1 Jones, (N. C.) 131; *Moore v. Piercy*. A contract of sale of horses, stipulating that, upon the purchaser's failure to pay over to the vendor the first money, on their resale they should be subject to the vendor's order, construed to pass the title, such appearing to be the intent. (*Chamberlain v. Dickey*, 31 Wis. 68.)

² It has always been admitted to be an impossibility to prescribe a definite rule as to what is or is not a fraud. The only definition of "fraud" is "fraud." (*Story on Sales*, Sec. 158, citing *Hadley et als. v. Clinton Co. Etc.* 13 Ohio, (N. S.) 502.) A cow had been sold for \$1,050, upon representations and advertisements of a sale of celebrated foreign cattle, equal to any previous importations from England. The sale took place Aug. 9th, 1854. There was a printed advertisement of the stock advertised for sale; there was a specific advertisement and description of the animals offered. Of the one sold to plaintiff, the description was: "No. 10. Princess, roan, calved in 1852, bred by R. W. Stapleton, got by Lord Newton, dam Kate, by Isaac, 9239," etc., showing a length of pedigree, and referring to the number in the herd-book. As a matter of fact, the cow proved to be four years old, and hence this advertisement—in a material point, the age of the animal—was false; but the president of the company making the sale openly proclaimed that, although the company had full confidence in the skill and honesty of their agent, who had purchased the stock, and on whose representations the advertised descriptions were based, yet that the company did not warrant the representations, but offered to the purchasers all means of inquiry at command of the company.

The Court gave the rule of fraud as cited in the text, pp. 506-7, but in the special case held that there was no fraud; that no warranty was offered or expected as to the age of the cow; no untruths were uttered or accepted by the vendors, the importing company; they gave, or professed to give, what information they had, and tendered to purchasers the same means which they, the vendors, had for informing themselves. (*Carter v. Abbott*, 33 Iowa, 180.)

³ *Story on Sales*, Sec. 485; *Ibid*, Sec. 159. Thus, where the defrauded party sees fit to settle the matter, he being aware of the fraud, he has no relief after having voluntarily released him who had committed the fraud, and accepted the contract after knowing of the fraud. (*Parsons v. Hughes*, 9 Paige's Ch. R. 571.)

fraud.¹ But if both parties are guilty of fraud the law will leave them as it finds them, and will enforce no claim by one against the other.²

§ 111. Any misrepresentation of a material fact annuls a contract made on the basis of it, whether the party making the false representation knew it to be so or not;³ so that it is not absolutely essential that the fraudulent intent be susceptible of proof, or to show that the person who has committed the fraud has been benefited by it, or to prove that there has been collusion with the party who is so benefited.

Where any trick has been played or artifice used by which a party has been deceived, and by means of the deception induced to make the contract, it cannot be enforced against him.

An exception to the general rule appears to be established in

¹ *Bruce v. Davenport*, 3 Keyes, 472. "It is the duty of a party who proposes to disaffirm a contract entered into by himself as fraudulent, to do so at once upon the discovery of the fraud. It will not do to await a possible beneficial issue to the contract, and to repudiate it only when the danger to himself becomes imminent."

² No person can avail himself of his own wrongful acts, and hence, when both are at fault, neither can invoke the aid of the law; it leaves them as it found them, equal, and without remedy against themselves or their own misdeeds. (2 *Parsons on Contracts*, 5th Ed. 1866, p. 782.)

Although, as a rule, fraud vitiates all contracts, it would seem that a fraud perpetrated on Sunday does not have that effect where laws for prevention of work on the Lord's day are in force.

In *Plaisted v. Palmer*, N. Y. Court of Appeals, July, 1875, "the defendant sold a horse to the plaintiff on Sunday; the plaintiff gave his bank-check for the price of the horse on the same day; the defendant at the same time deposited a bill of sale of the horse with a third person, to be delivered to the plaintiff when the check was paid; the check was paid, and the horse and bill of sale were delivered, all on a secular day, afterward. Held, that an action of assumpsit to recover back the price paid for the horse, on account of a deceit practiced in the sale, would not lie, because based upon a transaction tainted with illegality."

³ *Story on Sales*, Sec. 165. *Parsons on Contracts*, Vol. 2, 5th Ed. 1866, stops a little short of the rule as stated in the text, and says that "the doctrine is not fully settled; that it would often be very harsh and apparently unjust to inflict all the consequences of fraud on one who had made a material misstatement in ignorance only because of his own error"; but it would seem still more unjust, says the same writer, to permit all the consequences of this false statement to fall and rest on him whose only fault was in believing that one told the truth who was in fact stating that which was false. Possibly there should be a distinction in law, as there is in morals, between him who is mistaken and the person who tells a willful untruth, but the effect is the same; one party is deceived to his injury, and the simple question is which shall suffer.

favor of negotiable paper, such as promissory notes. The bona fide holder who has bought the note before maturity for a valuable consideration, and without notice of fraud, is protected where, by negligence on his part, the maker of the note has enabled a fraud to be perpetrated upon him in the making of the note. The most noticeable instances in point have occurred within the past few years in the matter of the so-called "Hayfork Commercial Paper," in which adroit knaves have imposed upon unsuspecting farmers by proposing an arrangement, obviously beneficial to the victim, to accept an agency for the sale of agricultural implements; upon the proposal being accepted, the new agent signs, as he supposes, a receipt for the merchandise; this last is so worded, and the spaces between words so arranged, that by tearing off a part of the paper the remainder is a perfect negotiable promissory note, and the note being sold, the holder brings suit on it. The maker, in defense, meets at the outset with a serious difficulty in the legal presumption that the holder has taken it before maturity innocently and for value,¹ and it is almost impossible, from the nature of things, to avoid this presumption. These notes were at first held to be void, on the general proposition that such a trick as the one indicated vitiates the contract; that no note ever had been signed, and that the whole matter was a fraud. But the later decisions and the best law writers hold otherwise; that there was a note; that some contract was intended to be made, and the carelessness of the farmer enabled the scamp to perpetrate the fraud, and that the peculiar hardship of the cases did not justify departure from well-established rules. Between the parties, however, the trick would destroy the contract, and the parties would be restored to their relative positions before making the arrangement. Upon the same general principle, in the matter of purchase and sale of property, if the purchaser make false representations as to his means of pay-

¹ *Pasley v. Freeman*, 3 T. R. 51. If one injures another by statements which he knows to be false, he will be held answerable, although there was no evidence of gain to himself, or of any interest in the question, or of malice, or intended mischief. (*Foster v. Charles*, 6 Bing. 396; *Corbett v. Brown*, 8 Bing. 83; *White v. Wheaton*, 3 Selden, 352.)

ment, he has no right to the property bought, and the seller will be justified in retaking the property, provided he can do so without force.

§ 112. Concealment is not necessarily fraudulent, unless there exists between the parties such a relation as to impose an obligation to state every material fact or circumstance by reason of the existence of some special trust reposed in the party who conceals the fact by him with whom he is dealing.¹ But the vendor must do nothing to prevent the buyer from ascertaining the facts; for if by any means he prevents the purchaser from coming to a knowledge of the truth, and especially if he make any false suggestions, it is at the risk of vitiating the sale.²

¹ Story on Sales, 174; *Haycraft v. Creary*, 2 East, 92; *Gallagher v. Brunel*, 6 Cow. 346. "It will be presumed, in the absence of proof to the contrary, that the holder of negotiable paper received it for value, before maturity, and in the regular course of business." (*Shirts v. Overjohn*, Sup. Ct. Mo. May Term, 1875.)

² Story on Sales, 176; *Mathews v. Bliss*, 22 Pick. 53; *Prescott v. Wright*, 4 Gray, 461; 2 Cent. L. J. 423, to same point.

In *Sims v. Bice*, 67 Ill. 88, a farmer, who could not read readily, while plowing in his field with a pair of young mules, was accosted by a person who represented himself to be an agent of a corporation engaged in the manufacture of agricultural implements; the pretended agent induced the farmer to become a sub-agent, and act for the company in the sale of the machines. A paper was presented to the farmer to sign, which was to be an acceptance by him of the employment. By a trick, this paper, which he signed, could be turned into a promissory note by tearing off a part of the sheet on which it was printed. The trick was perpetrated, and the promissory note so obtained was sold, and, by the innocent purchaser, sued.

The defense developed the facts above stated. Held, "where a party is induced to sign a promissory note, under the representation and belief that the same is an agreement appointing him agent for the sale of machines, and a statement of his ownership of property, and he cannot read writing readily, as between the parties it will be void, as having been executed through fraud and circumvention." "That where a person executes a paper he must be diligent, and use all reasonable means to prevent a fraud being practiced upon him, or he will be liable to an innocent purchaser before maturity. He is not required to use every precaution, but only such as would be expected from men of ordinary prudence. The assignee, equally with the maker of a note, is bound to use proper diligence, and when agents for the sale of patent rights, and such matters, who are strangers, offer to sell promissory notes, taken by them, a prudent man would have his suspicions roused, and in such case the purchaser ought to protect himself by inquiring of the apparent maker."

Shirts v. Overjohn, Sup. Ct. Mo. May Term, 1875. Defendant testified as follows: "At the time I signed the note sued upon, the payee wanted me to act as an agent for the sale of plows. At the time I signed the note sued on I supposed I was giving a receipt for the plows. There was no consideration of any

§ 113. Statute of Frauds in sales of animals.—The Statute of Frauds has, for about two centuries, been the law of England,* and is, with slight variations, that of each of the United States. Sec. 17 provides that no contract for the sale of any goods, wares, or merchandise, for a price of £10, or upwards, shall be valid unless some note or memorandum in writing be made and signed by the party to be charged thereby, or some earnest be given to bind the bargain, or part payment be made, or the buyer actually accept and receive part of the goods.

Therefore, a valid sale of animals, or any other chattel, can only be made, (the price of the same being equal to or more than the amount limited by the act) when: 1st. The buyer either actually receives or accepts the animals, or some portion of the lot sold; or 2d. He makes a part payment or gives an earnest to bind the trade; or 3d. The party to be charged, or his agent, make and sign some memorandum in writing of the bargain.¹

kind for the note, which I thought and understood to be a receipt only; as a matter of fact, it was such a receipt, but was so adroitly printed that, by having the place of signature arranged for the middle of the piece of paper, and a scarcely observable space between the words, about two-thirds across the sheet, the right-hand end, say one-third of the piece, could be torn off, and leave a complete promissory note."

The trick was sustained by the Court, and judgment given on the note in the hands of the assignee, on the ground that the negligence of the maker of the note, in not observing the trick, enabled a trickster to deceive an innocent party; that it having appeared that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument, but neglecting to avail himself of such means of information, and relying on the representations of another as to the contents of the instrument, signed and delivered a promissory note, instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a bona fide holder. (3d Cent. L. J. 423.)

Citizens' National Bank v. Smith, 55 N. H. 593. The defendant was induced to sign his name, as maker, to a negotiable promissory note, by false and fraudulent representations that it was a contract of an entirely different character, whereby he would incur no pecuniary liability; but it appeared further, that it was a negligent act on his part to sign the note without ascertaining whether it was what the payee represented, or something else. Held, that the defendant was precluded by his negligence from setting up the fraud, against a bona fide holder of the note who had purchased it for value before due. (3d Cent. L. J. 163, March 10th, 1876.)

¹ In the several States, the amount, which in the original statute is put at £10, is varied. This amount is, in Alabama and California, \$200; Colorado, Georgia,

As to what should constitute an acceptance of the property sold will depend somewhat upon the circumstances, but it is a fact to be proved like any other, and its proof is subject to the ordinary rules of evidence. An actual delivery needs no definition; a constructive acceptance is a fair matter of inference from the conduct of the buyer. As for instance: A man verbally agreed to buy some sheep which he had selected from plaintiff's flock, and directed them to be sent to his field, which was done; he counted them, and said "It is all right"; afterward he tried to repudiate the bargain, but could not.¹

§ 114. Mistake as to a material fact will vitiate a sale. No contract can be said to have been reciprocally binding, where it is founded upon an injurious mistake of facts, a proper understanding of which was essential to determine as to the propriety of making the agreement; and it appears not to make any difference whether or not the person might, with more or less ease, have informed himself as to what the facts were; he must not only have the means of acquiring the knowledge, but he must have availed himself of them.²

Indiana, Massachusetts, Michigan, Minnesota, Oregon, South Carolina, Wisconsin, and Maryland, \$50; Connecticut, \$35; New Hampshire, \$33; Arkansas, Maine, Missouri, and New Jersey, \$30; Delaware, \$25; in Florida and Iowa, no amount is specified; all sales for whatever amount are within the statute rule, and must be evidenced by acceptance, earnest, or part payment.

In Illinois, Kansas, Kentucky, Mississippi, North Carolina, Nevada, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia, this Sec. 17 has not, in terms, been adopted, but similar Statutes of Frauds are there in force. So, also, in California. (*Mayer v. Childs*, 47 Cal. 142.)

¹ *Saunders v. Topp*, 4 Ex. 390.

Where a person had made to another an offer of a horse at a certain price, and he to whom this offer was made offered to sell the animal to a third party at an advance, and took him to where the horse was for him to decide, this was held by the Court to be an acceptance, and that the sale was thereby completed; although the horse was not removed from the original vendor's stable, and the party did not succeed in selling him at the advance; by exhibiting and treating the property as his, he indicated his acceptance of the property. (*Blenkinsopp v. Clayton*, 7 Taunt. 597.)

² *Bell v. Gardiner*, 4 Man. & Grang. 11; *Lucas v. Worswick*, 1 Mood. & Rob. 293; *Kelly v. Solari*, 9 Mees. & W. 54. In this case, the chief baron, Lord Abinger, in deciding the cause, held that notwithstanding it appeared that the party to be charged had once knew the fact, yet if he had forgotten it and acted upon a belief, honest at the time, in a different condition of things which was not true, he might avail himself of his mistake, although he had once known what the truth was. It was further held that the knowledge of the facts which

A mistake may be as to the character or nature of the property sold, the buyer supposing he bought one thing when in truth it was another; so if a mistake arise as to the existence of the animal sold, as if a horse were sold, he being at the time dead, though neither party knew that fact; and so if one party understands the sale as absolute, and the other conditional. In all such cases there is no perfect assent, and hence no sale.¹

"disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment."

In *Rutherford v. McInn*, 24 Ala. 750, it was held that in a contract where money had been paid over under a mistake as to the controlling facts of the contract, the agreement could be ignored and the money paid recovered without a demand being made before suit was brought.

To the same point, *Guild v. Baldrige*, 2 Swan, (Tenn.) 295; *Boyer v. Peck*, 2 Denio, 107; 1 Story's Eq. Jr. Sec. 140; *DeWitt v. Duncan*, 46 Cal. 342.

"There may, however, be cases in which, by proper investigation, the person making the mistake might have informed himself concerning the actual state of the facts material to his contract, but he declines or refuses to do so, and voluntarily assumes the risk of his ignorance and negligence, in which he would be bound to abide the consequences of his mistake. In these cases the maxim applies: *Lex vigilantibus, non dormientibus subvenit*." (Story on Sales, Sec. 146.)

But if a party make a mistake in a matter wherein it is his duty to be informed, any loss which may result from his error he should bear. (*Taylor v. Fleets*, 4 Barb. 95; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.)

¹ *Allen v. Hammond*, 11 Peters. 63-71. In this case, the rule is stated to be that given in *Hitchcock v. Giddings*, Daniels' Equity Reports, p. 1, viz: "A vendor is bound to show that he actually has that which he professes to sell. And even though the subject of the contract be known to both parties to be liable to a contingency, which may destroy it immediately, yet, if the contingency has already happened, it will be void." To illustrate this proposition, the learned judge, (McLean) in giving the decision of the Court, (11 Peters, p. 71, *Allen v. Hammond*) says: "If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?" Clearly not intending to ask as though there could be a doubt, but only by way of elucidating the proposition by stating it in a form not open to doubt.

And so where the extent or quantity of property sold is a matter on which it fairly is shown that there has been mistake or misunderstanding. As where certain articles are, by the purchaser, supposed to be included in a sale, but the vendor neither intends or supposes anything of the kind: as, for example, a farm is sold and the buyer really believes that he is also, under the sale, to have the animals on the farm, but misunderstands the bargain and does not get them. "In such cases, since the mistake immediately touches the consideration, it will afford sufficient ground for annulling the contract if the mistake be other than trifling and insignificant." (Story on Sales, Sec. 151.)

In his work on equity jurisprudence, Sec 144, the same distinguished writer says: "It is impossible to say that one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of a part only."

§ 115. "Let the buyer beware."—Notwithstanding all the protections against fraud and mistake which have been considered, *caveat emptor* is emphatically the maxim of all others most to be regarded in the sale of animals. The purchaser, as a rule, and in the absence of express or implied warranty, buys at his own risk, and the seller is only bound to show that the animal is of the species which it purports to be—nothing more; and if the purchaser makes no inquiry as to its value, character, condition, soundness, or quality, as the case may be, and it turns out to be less perfect or valuable than the purchaser supposed, he must bear the disappointment.

This maxim of *caveat emptor* applies to every sale of chattels, unless there has been: 1st. An express warranty; 2d. An implied warranty; or 3d. Fraud, or false representations made by the seller to induce the purchaser to buy.¹

¹ "The first and general rule relating to warranty in cases of sales is that the purchaser buys at his own risk; *caveat emptor*, unless the seller give an express warranty, or the law implies a warranty from the circumstances of the case or the nature of the thing sold; or unless the seller be guilty of a fraudulent representation or concealment, in respect to a material inducement to the sale." (Story on Sales, Sec. 394.)

The rule, *caveat emptor*, applies to the sale of a "cribber, where an examination of the horse's mouth by the purchaser would have disclosed the defect." (Dean v. Morey, 33 Iowa, 120.)

The doctrine of the common law renders the vendor liable to the purchaser when he practices any artifices to conceal defects; or makes any representations to throw the buyer off his guard; or when any special trust or confidence is reposed in the vendor; or where there is a latent defect known to the seller, which ordinary and reasonable caution upon the part of the buyer will not be liable to disclose. But if the defects in the animal be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee. (2 Kent's Com. 482-90; Welmer v. Clement, 37 Penn. St. 147.)

A vendor of goods is not answerable for their quality, unless he has expressly warranted them, or has been guilty of fraudulent representation or affirmation of a quality known to be false. "The maxim of the civil law that, 'a sound article is warranted by a sound price,' has never been adopted in Pennsylvania." (Jackson v. Wetherell, 7 S. & R. 422; McFarland v. Memmer, 9 Watts, 55; Day v. Pool, 52 N. Y. 416; Hawkins v. Pemberton, 51 N. Y. 198.)

"The common-law doctrine, *caveat emptor*, has received very important modification in the course of modern adjudications." (Albany Law Journal, January 16th, 1875.)

CHAPTER IX.

WARRANTY ON SALE OF ANIMALS.

- § 116. Contract of warranty in sale of animals.
- § 117. Warranty of title by sale of animals.
- § 118. Warranty may be made any time before sale.
- § 119. Express warranty.
- § 120. Warranty to be made good in letter and spirit.
- § 121. Visible defects not covered by warranty.
- § 122. Words of description, when a warranty.
- § 123. Expression of opinion, when a warranty.
- § 124. Implied warranty.
- § 125. Warranty of merchantable character of article sold.
- § 126. Warranty against latent defects.
- § 127. Warranty in sales by sample or specimen.
- § 128. Implied warranty in cases of fraud.
- § 129. Measure of damages on breach of warranty.

§ 116. A contract of warranty is distinct from that of sale, although, naturally, it is often contemporaneous with it, and each contract or promise is the consideration for the other.

The contract of sale being consummated, the next question is as to whether the animals are of the quality and nature which the purchaser might properly believe he had bought; and should it occur that they are not, then whether he is entitled to rescind the contract, and recover the price which he has paid. Having already considered all matters of fraud, mistake, etc., which would vitiate the contract *ab initio*, we are led directly to consider whether the seller has made a second contract, by which he warrants the property to be of a specified character or value.

§ 117. By the sale of an animal a warranty of title is made.—The first and general rule, as we have seen, is that the purchaser buys at his own risk, *caveat emptor*, but this must not be understood as applying to the title of the animals.¹

¹ *Chambers v. Griffith*, 1 Esp. 150; *Rogers v. Hanson*, 35 Iowa, 283.

If the vendor is not the owner he cannot sell, and hence, there having been no sale, the warranty results directly from the right to recover the price paid. And if the vendor have a number of animals in his possession, and he sell them in a lot, but only owns a part, the vendee might, ordinarily, retain the portion which the seller had a title to, and enforce an abatement of the price, or if paid, restitution of a part of it proportionately; and if the contract of sale is separable, the purchaser would be obliged to keep that part of the property sold to which the vendor had title, and pay the stipulated price. As, where a person sold a horse and cow together, the price being, for the cow forty dollars, and for the horse one hundred, and the title of the vendor failed as to the horse, the buyer was obliged to keep and pay for the cow, which the vendor had a right to sell, and to which he could give title. But if the contract of sale be entire, that is, the price one whole sum, not divisible into lesser ones, which would severally be the stipulated price for the animals which did belong to the seller, then the whole sale would fall.¹

§ 118. A warranty may be made at any time before the trade is closed; but, in order that the contract of war-

¹ Ibid; *Roffey v. Shallcross*, 4 Mad. Ch. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strobe*, 1 Coop. Sel. Cas. 510; *James v. Shore*, 1 Stark. 426; *Roots v. Dormer*, 4 Barn. & Adol. 77; *Judson v. Wass*, 11 Johns. 525. A contract to deliver five hundred gunny-bags, more or less, is substantially complied with by a delivery of four hundred and seventy-five bags, and the vendor may recover for those actually delivered. (*Cabot v. Winsor*, 1 Allen, 546.)

Casamajor v. Strobe, 1 Coop. Sel. Cas. 510; *Roffey v. Shallcross*, 4 Mad. Ch. 227; 2 Kent's Com. 470. Under a contract for the sale and delivery of fat hogs of a certain character or weight, at a specified time and place, it is the duty of the seller to have them there as required, ready for delivery; and if, as first offered, the hogs do not comply with the contract, the vendee is under no obligation to comply with a request of the vendor that he go into adjoining lots, owned by other parties, and with whom the seller has made arrangements to that effect, and select therefrom enough hogs to make the lot comply with the contract. (*Cash v. Hinkle*, 36 Iowa, 623.) If the hogs did not, as at first offered, comply with the contract, it became the duty of the vendor to make them comply, else the vendee was not bound to accept. (*Williams v. Triplett*, 3 Iowa, 518.)

It was the duty of the vendee to have the hogs at the time and place of delivery, set apart and designated for that purpose, unless excused by a refusal to receive. (*Cash v. Hinkle*, 36 Iowa, 627; *Williams v. Triplett*, 3 Id. 518; *Gross v. Kierski*, 41 Cal. 111; *Spofford v. Stutsman*, 9 Id. 123; *Grames v. Manning*, 2 G. Gr. 251.)

But see dissenting opinion in *Cash v. Hinkle*, 36 Iowa, 628.

ranty should form part of the agreement, it must be made before the contract of sale is completed, or, at the latest, at the close of the transaction; and, if left until the last, it must plainly appear to have entered into the bargain, and been an inducement to it.¹

A separate and distinct contract of warranty, upon other consideration than that of the sale, may, however, be made after the sale is consummated; but it must stand entirely upon its own merits, and be founded upon a valid, sufficient consideration.² The warranty need not be made personally by the vendor; his agent, duly authorized, may bind him thereto. A careful examination should be made as to what power, in that behalf, the agent has from his principal, there being here to be observed a distinction, which frequently becomes important, between the powers of a general and those of a special agent.

A general agent is one who has power, for his principal, to do all acts connected with the line of business, occupation, trade, or transaction to which the agency relates. A special agent has no power except to do a certain specified act. He can only bind his principal to the extent of this special power conferred, and, if he exceeds his special instructions, the principal is not bound; but a general agent may bind his principal by all acts done within the general scope of his agency, and even where he exceeds or violates his instructions from the principal.³

¹ *Parker v. Abbott*, 33 Iowa, 180. This was an action upon an alleged warranty that a cow was "coming in" at the next ensuing spring. The seller knew that she was not with calf, but stated that she was "coming in in the spring." Held, that any distinct affirmation of quality made by the seller during the negotiation, which was relied upon by the buyer and was operative in causing the sale, amounts to a warranty.

² *Vincent v. Leland*, 100 Mass. 432; *Budd v. Fairmauer*, 8 Bing. 48; *Leddard v. Kain*, 2 Bing. 183; *Tuttle v. Brown*, 4 Gray, 457; *Bloss v. Kittredge*, 5 Vt. 28; *Reed v. Wood*, 9 Vt. 285; *Hoggins v. Plimpton*, 11 Pick. 97; *Burton v. Young*, 5 Harrington, 223; *Conger v. Chamberlain*, 14 Wis. 258; *Burton v. Young*, 5 Harrington, 233; *Summers v. Vaughn*, 35 Ind. 323. There is no particular phraseology necessary to constitute a warranty. The assertion or affirmation of a vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies upon, and which is understood by the parties as an absolute assertion, and not the expression of an opinion. (*Hawkins v. Pemberton*, 51 N. Y. 198; *Wadleigh v. Davis*, 63 Barb. 500.)

³ "It is not necessary, in order to render the vendor liable, that the warranty

§ 119. Express warranty is a clear, distinct contract, must be sustained by proper consideration, and is governed by the ordinary rules applicable to contracts.

The warranty may be made in any manner which sufficiently indicates that the minds of the parties have met and agreed, whether that fact is manifested by affirmation, signs, or writing. It may be entire, covering every possible contingency, or special, and limited to one; it is the creature of the parties, and they may mould it into any shape that suits them; but once formed, and assented to, it becomes a definite agreement, into which have been merged all the previous conversations, treaties, and arrangements of the parties in the premises.¹

§ 120. The warranty must be made good to the spirit and letter, and, to hold the seller, the buyer need only show that the animal does not correspond to the exact terms of the warranty; thus, where a horse was warranted to be "a good drawer, and he pulls quietly in harness," it was shown that he did not pull *quietly* in harness, although he was a good drawer. Held, that this did not satisfy the warranty.²

should proceed from him personally, but that he will be equally bound if it be made by any one held out by him to be his agent in that behalf." (Story on Sales, Sec. 350.)

The authority of an agent is not necessarily to be proved by written instruments, but may be established by the habit and course of business of the principal. (Franklin v. Globe Ins. Co. 52 Mo. 461.)

¹ "Where there is a warranty on sale of goods, without fraud, and there is no stipulation in the contract that the goods may be returned, the vendee has no right to annul the contract, without the consent of the vendor, for a breach of the warranty; but in an action for the price, the warranty and breach may be given in evidence in mitigation of damages, on the principle of avoiding circuity of actions." (Doane v. Dunham, 65 Ill. 512.)

Bywater v. Freeman, 1 A. & E. 508. So, also, a warranty may be a qualified or conditional one, involving a certain course of conduct by the vendee, as where a horse was sold with a warranty against defects from a swelling in his leg, provided it was kept cool and washed with salt and vinegar. In a case involving this proposition, under the circumstances detailed, it was held that the vendee was bound to so treat the animal, and that the provisional character of the warranty was enough to justify and excuse him from trying any other treatment, because by so doing he might lose his warranty. (Smith v. Borst, 63 Barb. 57.)

Pasley v. Freeman, 3 T. R. 57; Vandewalken v. Osmer, 65 Barb. 556; Hawkins v. Pemberton, 51 N. Y. 198.

² Colthard v. Funcheson, 2 Dowl. & Ry. 10; Franklin v. Globe Ins. Co. 52 Mo. 461.

The warranty may be limited as to time; as in case where a warranty was to last until noon of the day following the one on which it was made.¹

No particular form is requisite to constitute a warranty; any affirmation, made by the vendor at the time of the sale, is a warranty, provided it appears from the evidence to have been so intended and understood by the seller and buyer respectively.²

§ 121. Defects which are visible not covered by warranty.—Patent defects are not understood to be included in a general warranty; such defects as are apparent upon a casual inspection of the property, or of which the buyer was aware at the time of the sale, are not to be regarded as being covered by a general warranty. In such a case, the warranty cannot be an inducement to the sale, as a reasonable man can hardly be supposed to part with his money, and take the animal, relying upon a warranty which he knows must necessarily return to him his money and to the seller the animal sold.³

A party, therefore, who should buy a horse, knowing it to be blind, could not, on that account, recover against the vendor upon a general warranty.⁴ But if the buyer neglected to examine, which he may do, relying on the warranty, or if he, being blind, could not discover the defect, and was unaware of its ex-

¹ *Bywater v. Richardson*, 1 A. & E. 508.

² *Pasley v. Freeman*, 3 T. R. 57. It is not necessary for the seller to say "I warrant." It is enough if he employ such language as to indicate that the article is of a particular quality, or is fit for a particular purpose. As where the seller said, "This horse is sound," it was held a warranty of soundness. (*Jones v. Bright*, 5 Bing. 553.)

"To constitute a warranty no precise words are necessary; it will be sufficient if the intention clearly appear." (*Moore v. McKinley*, 5 Cal. 471; *Hawkins v. Pemberton*, 51 N. Y. 198.)

³ In *Onelda M. S. v. Lawrence*, 4 Cowen, 440, Chief Justice Savage says: "There is no particular phraseology necessary to constitute a warranty. The assertion or affirmation of a vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." So in *Sweet v. Bradley*, 24 Barb. 549; *Wilbur v. Cartwright*, 44 Id. 536; *Munson v. Lumbard*, 18 Pick. 66. But if it is patent that the assertion is not true, it cannot be relied upon. (*Story on Sales*, Sec. 354.)

⁴ *Story on Sales*, Sec. 354; *Williams v. Ingram*, 21 Tex. 300; *Hill v. North*, 34 Vt. 604; *Butterfield v. Burroughs*, 1 Salk. 211; *Dyer v. Hargrave*, 10 Ves. 505; *Margetson v. Wright*, 7 Bing. 606. And parol evidence is admissible to show that the vendor informed the vendee, at the time of the sale, of the defect charged. (*Schuyler v. Russ*, 2 Caines, 202.)

istence, the seller would be held upon his general warranty, although the defect was apparent;¹ and if, to discover the fault, any special skill or knowledge was requisite, the warranty would hold the seller, especially if it be seen that the buyer has not the special skill or information, although to a person skilled in such matters the defect would be plainly apparent.²

• § 122. Words of description, when a warranty.— Whether mere words of description, contained in a receipt or bill of sale, constitute an express warranty, is an open question.³

¹ *Butterfield v. Burroughs*, 1 Salk. 211; 3 Blackst. Com. 465; Story on Sales, Sec. 354.

² *Pinney v. Andrus*, 41 Vt. 641, in which, upon a warranty of sheep, which were affected by "foot-rot," the Court declares the general rule that a vendor is exempt from liability upon a general warranty of soundness, where the defect is perfectly visible and obvious to the unaided senses, but also holds that the rule does not extend to an apparent defect, to understand the true nature and extent of which requires the aid of skill, experience, or judgment. And, under such circumstances, a vendor may warrant against defects which are patent and obvious, as well as against any others. (1 Parsons on Con. 576, Note h; *Chadsey v. Green*, 24 Conn. 562; *Hill v. North*, 34 Vt. 604; 1 Smith's Lead. Cases, 221.)

³ *Budd v. Fairmauer*, 8 Bing. 51. This was a sale of a colt; the receipt was as follows: "Received of A B £10, for a gray four-year-old colt, warranted sound in every respect." It was held that, so far as regarded the descriptive part of the receipt, the buyer was bound to prove willful misrepresentation, or he could not recover, and that it was not covered by the warranty.

The Chief Justice, Tindal, said: "I should say that, upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was a matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty. Whereas, if an article be sold by description merely, and the buyer afterward discovers a latent defect, he must go further, and allege the *scienter*, and show that the description was false, within the knowledge of the seller. And where there is an express warranty as to a single point, the law does not, beyond that, raise an implied warranty that the commodity sold shall also be merchantable. Therefore, in *Parkinson v. Lee*, 2 East, 313, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple representation stands, therefore, in a very different situation from one who gives a warranty. And, if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a gray four-year-old colt, warranted sound, he means to say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shown to be false within his

If, in the writing, there are no express terms of warranty but a description of property, which is in such definitory terms as to manifest that the article is of a certain grade, kind, or quality, an inference may result that such must be the property sold. Whether such description shall be regarded as showing the intention of the parties, and hence be a matter of fact for the jury, or a contract, the construction of which is a legal proposition to be determined by the Court, is not clear; nor can any rule, free from doubt, be deduced from the authorities, whether such descriptive words constitute a warranty or not, but possibly the want of harmony may be obviated by saying that where, in the memorandum, there are words which amount to a contract of warranty as to a particular quality, such will constitute an implied exclusion of warranty as to every other quality, upon the maxim, "*Expressio unius est exclusio alterius.*"

§ 123. Expression of opinion by vendor, when a warranty.— Mere expressions of opinion by the seller must not be relied upon as a warranty. The tendency of all modern decisions is to enlarge the responsibility of the seller, and to give such constructions to his statements and affirmations as to make them warranties wherever they were so considered by the buyer, or operated as an inducement to purchase. The rule that the buyer must beware is gradually yielding to the pressure of this tendency, and the seller must now be upon *his* guard that he does not, without intending it, become bound to warrant the character of the property by his eagerness to sell.

For all this, the buyer must not confuse simple commenda-

knowledge." "What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer, from the terms used, that the party had expressly contracted that the animal should be four years old? The collocation of the word *warranted* shows that such was not the intention of the parties. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness."

"It is settled, that any positive affirmation of character, as well as of quality or condition, may be construed as a warranty. This doctrine certainly seems more accordant with reason than the ancient doctrine. The question whether a warranty can be implied, in the absence of some such positive affirmation on the part of the vendor, is more serious." (*Albany Law Journal*, January 16th, 1875, p. 42.)

tion, or vague assertions of value by the buyer, with a contract of warranty.¹

Boastful talk, by the seller, is not unusual in the sale of animals, and the praise, by the owner, of his horse or other livestock, is not always regarded as an affirmation of an absolute verity. The buyer may test the sincerity of the seller by requiring him to make good his assertions by a warranty. If he fail to take that precaution, he should suffer for his neglect, and the seller will not be bound by the loose talk which may be regarded usual, if not become by precedent an almost necessary adjunct to such sales.²

But if the seller make a statement of his belief or opinion, where he entertains no such belief or opinion, and but expresses it to mislead the purchaser, he having reason to believe that the party would rely on his judgment, learning, skill, or special information in the premises, a Court of Equity would treat such conduct as constituting a fraud, and will set aside the contract if the untrue statements operated materially to deceive, and induced the purchase by the buyer.³

¹ The seller's mere commendation of the chattels sold—as, in answer to the purchaser's inquiry as to diseased sheep, "They appear to be healthy, and are doing well"—is not a warranty. (*Tewksbury v. Bennet*, 31 Iowa, 83.) And so held as to the words of an auctioneer: "Here is a nice lot of young, sound sheep." (*McGrew v. Forsythe*, 31 Iowa, 179; *Horton v. Green*, 66 N. C. [1872] 596.) But a representation, at a sale of a horse, that the animal is fourteen years old, is a warranty that he is no older. (*Burge v. Stroberg*, 42 Ga. 89) Here a distinct fact is averred; but in another case, where the seller of a horse, at the sale, being asked about his eyes, said, "They are as good as any horse's eyes in the world," it was held that that did not necessarily constitute a warranty. (*House v. Fort*, 4 Blackf. 293.) And so, also, it was held, where the seller of a horse told the purchaser, before the sale, "that he was sure that the horse was perfectly safe, kind, and gentle in harness," that this was not a warranty.

² Story on Sales, Sec. 360; 2 Kent's Com. 485.

³ Story's Equity Jurisprudence, Sec. 198; Story on Sales, 169a. This is, however, an exception to the general rule, that mere expressions of opinion should not constitute warranty, and should, as such exceptions, be closely scrutinized.

The general rule is given by Chancellor Kent. (2 Kent's Com. Sec. 484.) "When the means of information relative to facts and circumstances affecting the value of the commodity be equally accessible to both parties, and neither of them does or says anything tending to impose on the other, this disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract. There is no breach of any implied confidence that one party will profit by his superior knowledge, as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required."

§ 124. **Implied warranties** are such as the law implies from the circumstances of the sale, or the nature of the property sold. In the earlier cases much confusion is apparent, and seeming contradictions occur; much, if not all of this, arises from the manner of seeking the remedy in tort, instead of assumpsit, as is now done, in which the gist of the action is the promise of the seller, and not his fraud.¹

The law now implies a warranty when a sale is made. 1st. That the seller has a valid title; 2d. That the property is of a merchantable character; 3d. That it is fit for the use for which it is sold; 4th. That it is free from faults concealed by the seller; and 5th. If the sale is by specimen, or sample, that the mass corresponds therewith.

Where the vendor has the property in his possession, the law implies a warranty on his part that he owns it; that if the vendee is deprived of it by one having a superior title, the vendor is responsible in damages for the breach of such implied warranty.²

But where the property is not in the possession of him who offers to sell it, there is no such implied warranty of title, and the purchaser becomes such at his own risk.³

But a representation, or positive and unequivocal affirmation by a seller, as to the state and quality of a thing sold, on the faith of which the buyer makes the purchase, is a warranty. (*Carter v. Black*, 46 Mo. 384.) "An affirmation made by the vendor at the time of sale amounts to an express warranty, if the facts alleged or proven show it to have been so intended and received." (*Giffert v. West*, 33 Wis. 617.)

¹ *Dale's Case*, Cro. Eliz. 44; *Chandeler v. Lopus*, Cro. Jac. 4; *Story on Sales*, Secs. 364-5.

² This was not originally the rule of the English cases; the older common-law rule as to the title of chattels was also *caveat emptor*, but the later English cases have modified this rule, and now the law in England is recognized to be, as stated by Mr. Benjamin (*Benjamin on Sales*, 466): "A sale of chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

Such is the rule now, in both this and the mother country. "The vendor of goods, in possession, selling them as his own, is liable to his vendee upon the implied warranty of title." (*Whitney v. Heywood*, 6 Cush. 82; 2 Kent's Com. 478; *Rew v. Barber*, 3 Cow. 272; 1 Parsons on Contracts, 456; *Huntington v. Hall*, 36 Maine, 501; *Bucknum v. Goddard*, 21 Pick. 71; *Dresser v. Ainsworth*, 9 Barb. 619; *Story on Sales*, Sec. 367.)

³ *McCoy v. Archer*, 3 Barb. 323; *Edick v. Crim*, 10 Barb. 445; *Long v. Higginbotham*, 28 Miss. (6 Cush.) 772; *Pratt v. Philbrook*, 33 Maine, 23.

The general rule of warranty by implication, from the fact of the property being in the vendor's possession, is subject to exceptions; as where the seller distinctly disaffirms any such warranty, as he may honestly do when in doubt as to whether the property (live-stock, for instance) belongs to him; if he be a pawn-broker, or officer of the law, or occupy such a position with reference to the subject of the sale, or manifests that he makes no pretense to be the owner, or to assume any responsibility.

Thus, a sheriff does not warrant title after he has paid over the money resulting from the sale; neither does an administrator, executor, or other trustee, after the purchase-money has passed out of their hands.¹

§ 125. Warranty that the property sold is of a merchantable character, and reasonably fit for the use for which it is sold, is an implied contract, where, from the circumstances, the buyer has no opportunity to inspect or fairly to judge of its quality, or where the vendor, being made aware of the special need of the buyer, offers to meet that necessity with such property as will satisfy it; but if the purchaser have a fair opportunity to see for himself, to judge of the fitness of the chattel, he must suffer for any carelessness, lack of judgment or skill; though where he relies upon the judgment or skill of the vendor, or on his personal information, as to the property offered by him for sale, and informs him of the use to which it is to be applied, the vendor takes upon himself, by implication, a contract to meet this want, and the law imposes upon him a warranty, when the sale is consummated, that he has done so.

The rule given in the text, that where the vendor is not in possession no warranty is implied, is not received without dissent, and it is claimed that the distinction between sales of personal property in possession, and out of possession of the vendor, is without proper foundation, and stands upon no sufficient reason or principle. (*Crosse v. Gardner*, 1 Shower, 68; *Furniss v. Leicester*, Cro. Jac. 474; *Defreeze v. Trumper*, 1 Johns. 274; *Spratt v. Jeffrey*, 10 Barn. & Cress. 249.)

But the distinction has become so well established that the rule is now, beyond reasonable doubt, that a vendor in possession does, and one out of possession does not, warrant title upon a sale of personal property.

¹ *Bartholomew v. Warner*, 32 Conn. 98; *Mockbee v. Gardner*, 2 Harr. & Gill, 176; *Ricks v. Delahanty*, 8 Porter, 133; *Prescott v. Holmes*, 7 Rich. Eq. 9; *Story on Sales*, Sec. 367a. But see *Cripps v. Reade*, 6 T. R. 606.

If I go to a dealer and ask him to sell me a horse fit to carry me, and he sells me one which he knows to be unfit to ride, he would be held on the implied warranty.¹ So, if I desire animals of a certain grade or quality, for a specific purpose, as sheep to mix and breed with my flock; a jack, stallion, or anything of that nature, or a calf from some special breed of cattle, I may go to a dealer who makes a specialty of the business of selling such as I want, and if he undertakes to furnish them, the law imposes on him a warranty that they are as desired in the respects mentioned, of the breed indicated, and fit for the declared purpose.²

§ 126. As to latent defects, the law implies a warranty against them, when the seller is aware that the buyer does not rely on his own judgment, but on that of the vendor, who

¹ *Keates v. Cadogan*, 2 Eng. Law & Eq. R. 320; *Deming v. Foster*, 42 N. H. 174.

In *Charter v. Hopkins*, 4 M. & W. 406, this language gives the rule: "Suppose a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it unless it was a horse fit for the purpose it was wanted for." (Story on Sales, Sec. 371.)

² Story on Sales, Sec. 371, Note on page 452 of 4th Ed. 1871. "The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities." "If a man sells a horse, generally he warrants no more than that it is a horse; the buyer puts in questions, and perhaps gets the animal the cheaper; but if he asks for a carriage horse, or a horse to carry a female, or one fit for a timid or infirm rider, he, who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purposes indicated."

In *Brown v. Eldington*, 2 M. & G. 279, Chief Justice Tindal says: "When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for that purpose."

Beals v. Olmstead, 24 Vt. 114. Plaintiff needed some hay for his oxen, and proposed to buy it of defendant. At the time of the purchase he said to defendant: "You know what use I wish to make of the hay: I want it to feed to my oxen during the spring and summer, while they are at work on the railroad." The sale was made upon this understanding, but the hay was found to be in bad condition, poorly cured, full of weeds, and not fit to feed to the oxen. The Court said: "The hay was bought for a particular use, and the defendant knew that the plaintiff would not buy an inferior article. The sale of the hay, then, for this particular use, ordinarily implies a certainty that it is fit for the use." (*Howard v. Hoey*, 23 Wend. 350; *Lespard v. Van Kirk*, 27 Wis. 152.)

Chief Justice Best, in *Jones v. Bright*, 5 Bing. 533, thus states the rule: "If a man sells a horse, generally he warrants no more than that it is a horse; but if the buyer asks for a carriage horse, or a horse to carry a female, or a timid or infirm rider, he, who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purpose indicated. The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities."

knows of the existence of the defects. This exception to the rule, "Let the buyer beware," is put upon the ground that where a serious fault exists, which is hidden from the buyer, but known to the seller, the latter, by his silence, is guilty of a constructive fraud; where, therefore, the defect is such that the vendee could not have detected it, he is deemed to have relied upon the openness of the seller, and if the seller, being himself aware of the existence of the defect, does not disclose it, such a concealment is a fraud sufficient to annul the contract. The whole doctrine turns upon this, that he who abuses the confidence placed in him by another, by false statements in the matter of a purchase and sale, shall be the sufferer, whenever, by his falsehood, the other is led to the commission of an act from which he suffers loss.¹ And an expression, even of belief or opinion, known by the utterer to be false, and which is by him intended to mislead the other party, will, if it actually do mislead him to his injury, be treated in equity as a fraud.²

§ 127. Where animals are sold by sample or specimen, the rule is as with other chattels; a warranty is implied that the whole lot fairly corresponds with the specimen given; as if a man sell a flock of sheep, a lot of cattle, or any other chattels, by exhibiting a sample, it is equivalent to a declaration, on his

¹ *Schneider v. Heath*, 3 Camp. 506; *Baylehole v. Walters*, 3 Camp. 154; *Chitty on Cont.* 553; *Hough v. Richardson*, 3 Story, 690; *Doggett v. Emerson*, 3 Story, 700. On this case, page 733 et seq., the learned judge (Story) who delivered the opinion, says: "It appears to me that it is high time that the principles of Courts of Equity, upon the subject of sales and purchases, should be better understood and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is felicitously expressed, *uberima fides*, in every representation made by him, as an inducement to the sale. He should literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement, or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial whether the representation be willfully or designedly false, or ignorantly or negligently untrue.

"The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain."

² *Story on Sales*, Sec. 160a; *Foster v. Swasey*, 2 Woodb. & Minot, 217; *Id.* 225-6; *Smith v. Babcock*, 2 Woodb. & Minot, 246.

part, that the specimen is a fair sample of the whole, and that the mass shall, at least, average with the one exhibited.¹

If the sample is only shown, however, to enable the buyer to form an opinion of the probable quality of all of the property; or if the purchaser had an opportunity to examine the lot; or if from the circumstances it appear that the vendor did not so sell as that it was by both parties understood to be "a sale by sample," no warranty is implied.²

And if a memorandum of the sale be made in writing it is not a sale by sample unless expressly so declared therein, inasmuch as the note, or memorandum, is the best evidence of what the contract was, and the conversations are all merged into and made final by the agreement of which the note is made; on the other hand, if there be an express warranty, and the article sold does not answer the description therein mentioned, even if it should correspond fairly with the sample which was shown when the warranty was given, an action will lie on the warranty for the same reason that the express warranty is the final contract, and, as such, will be enforced.³

¹ Story on Sales, Sec. 376. In an old English case decided by Lord Ellinborough, (*Gardner v. Gray*, 4 Camp.) the maxim was stated: "Where there is no opportunity to inspect the commodity, the rule *caveat emptor* does not apply." This maxim has been especially regarded as correct where, the sale being by sample, the bulk is not pretended to be exhibited. (*Leonard v. Fowler*, 44 N. Y. 289.) But just what is a sale by sample might be doubtful; as in a sale of wool the broker sent samples to the buyer, and offered to sell if the other would come and examine the lot; the buyer did so to some extent, examined several bales, and was offered an opportunity to have them all opened, if he desired, for his inspection. He purchased the wool, and it proved to have been deceitfully packed, and the bales were full of rotten fleeces. Held, not to be a sale by sample; and that it was a case where the doctrine of *caveat emptor* applied. (*Barnard v. Kellogg*, 10 Wall. 383; *Fay v. Raguet*, 14 Minn. 273.)

² *Lawton v. Kill*, 61 Barb. (N. Y.) 558; *Parkinson v. Lee*, 2 East, 313. In *Bierne v. Dord*, 2 Sandf. (S. C.) 89, it was held that, to constitute a sale by sample, the contract must be made solely with reference to the sample, and it must appear that the sale was intended and understood, by the parties, to be a sale by sample. (See *Hanson v. Busse*, 45 Ill. 496; *Woodward v. Libby*, 58 Me. 42.)

³ But if there is an express written warranty, and the purchaser examines the goods, there is, by this examination, no waiver of warranty. (Story on Sales, Sec. 355.) And, although the purchaser takes a written memorandum containing express warranties upon some special points, he is not thereby precluded from relying on the warranty otherwise implied by the law, 1871. (*Boothby v. Scales*, 27 Wis. 626.) And further, in this case, which was a sale and purchase of a fanning-mill, it was held that "the buyer of an article requiring skill and care in the construction and arrangement of its parts, to adapt it to its purposes, is entitled to a reasonable time after its delivery to test the same,

§ 128. Implied warranty created by fraud in the sale.

—Fraud vitiates all contracts. Hence, an implied warranty occurs where a sale has been effected by fraudulent misrepresentations or concealment of facts which the vendor was bound to disclose.

There is also another class of implied warranties, which result from any well established usage, with reference to which it may fairly be assumed the contract was made. Thus, in the case of *Jones v. Bowden*,¹ it was said that where sheep were sold as stock there was an implied warranty that they were sound, proof having been given that such was the custom of the trade, viz., “that sheep sold as stock were understood to be sheep that were sound.” This implied warranty from usage may result where no general custom is shown, if it appears that the parties have had many similar mutual dealings; in such a case, the sale will be presumed to be made in compliance with what has become the uniform practice and the understanding which thereon has grown up between the parties; but the general usage in the vicinity or the course of dealing between the parties must have been so universal and uniform as to give strong grounds for belief that the parties recognized and assented to it.²

and ascertain whether it is adapted to the purpose intended, and to return it if not so adapted.” (*Tye v. Fynmore*, 3 Campb. 462; *Nichols v. Godts*, 10 Exch. 197; *Willis v. Conaequa*, 1 Peters’ C. C. 301.)

¹ 4 Taunt. 847-853; *Weal v. King*, 12 East, 452.

Story on Sales, Sec. 211: “If nothing be said in relation to the terms of the sale, it will be presumed to be made in compliance with the general usage or custom of the trade, or with the uniform practice and course of dealing between the parties.” (*Wood v. Wood*, 1 Car. & P. 59; *Moore v. Voughten*, 1 Stark. 487; *Scott v. Irving*, 1 Barn. & Adol. 605; *Stewart v. Aberdein*, 4 Mees. & W. 211.)

² *Raitt v. Mitchell*, 4 Camp. 146-149; *Clark v. Baker*, 11 Metcalf, 186; *Winson v. Dillaway*, 4 Metcalf, 221, 223; *Mixer v. Coburn*, 11 Metcalf, 559; *Sutton v. Tatham*, 10 Adol. & El. 27; *Bayliffe v. Butterworth*, 1 Exch. 425.

Story on Sales, Sec. 361: “What the intention of the parties is depends often upon the usage and custom, and is a question for the determination of a jury. Thus, upon a warranty that a horse is sound, the actual understanding of the parties is, in a great measure, dependent upon the custom and usage, as well as upon the peculiar circumstances of the case.”

So, by the same author, it is said, in note 3, p. 428: “It seems, moreover, that the custom of any particular trade may establish an implied warranty between the parties who transact business therein; it being presumed, in the absence of evidence to the contrary, that the dealings of the parties were regulated by the custom.”

§ 129. The measure of damages on breach of warranty of personal property is ordinarily the difference between the real value of the article and what it would have been worth if it corresponded to the warranty. Where the warranty has been express, the Courts, of late years, have gone further than to make up to the buyer this difference in value, and have given all the damages, which were the natural result from the breach, and which might reasonably have been anticipated by the seller, and thus be deemed to have been considered by the vendor at the time when he gave the warranty.¹

In a late case, (1871) it was held "that if a usage be adopted by implied or tacit understanding, it is as obligatory upon the parties as if incorporated with the contract itself, provided the usage be not repugnant to or inconsistent with the terms of the contract, or in contravention of existing rules of law." (*Appleman v. Fisher*, 34 Md. 540.)

¹ "For a breach of warranty in the sale of chattels, the measure of damages is the difference between the actual value of the chattels and what their value would have been if they had been as warranted, to which may be added, in proper cases, the reasonable expenses incurred by the purchaser in consequence of such breach." (*Giffert v. West*, 33 Wis. 617.)

"The difference between the value of the article, as warranted, and the real value or market value, is the measure of damages on a breach of warranty." (*Seigworth v. Leffel*, Supreme Court Penn. Jan. Term, 1875.)

"The contract price does not enter into the question as a rule of measurement; and, in an action to recover damages on the warranty of a horse, the true measure is the difference between the value of the horse, if he had been sound, as warranted, and his value in the diseased state. The reason is a conclusive one. If the vendee made a bad bargain, he is not to be reimbursed what he lost, by his simplicity, in damages for a breach of the warranty." (*Ibid.*)

Brown v. Edgerton, 2 Mann. & Gran. 102; *Smead v. Ford*, 102 E. C. L. 612. Defendant contracted to deliver to plaintiff, a farmer, a threshing-machine within three weeks. It was plaintiff's practice, known to defendant, to thresh wheat in the field, and send it thence direct to market. At the end of three weeks, plaintiff's wheat was ready in the field for threshing; and on plaintiff's remonstrating at the delay in the delivery of the machine, defendant several times assured him it should be sent forthwith. Plaintiff, having unsuccessfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterward delivered to plaintiff, who paid the defendant the contract price. The wheat was then threshed; and it was found necessary, owing to its deterioration by the rain, to kiln-dry it. When dried and sent to market, it sold for a less price than it would have fetched had it been threshed at the time fixed by the contract for the delivery of the machine, and then sold, the market price of wheat having meanwhile fallen.

Held, in an action for the non-delivery of the machine, that plaintiff was entitled to recover substantial damages in respect of the expense of stacking the wheat, of loss arising from its deterioration by the rain, and of the expense of drying it in the kiln. Held, further, that he was not entitled to recover any damages in respect of the fall in the market price of wheat.

And in some cases of express warranty, the Courts have permitted the jury to regard profits which might reasonably have been anticipated by the buyer from the use of the article bought for a definite purpose. Thus, where seed has been sold, and warranted to be of a peculiar kind, or warranted to sprout and produce a crop, and the seed was different from the kind designated, or failed to produce generally, the vendor has been held for more than the mere difference in the value of the seed.¹

¹ *Hadley v. Baxendale*, 9 Exch. 341. Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such a breach of contract, should be such as fairly and reasonably may be considered as arising naturally; that is, according to the usual course of things, from such a breach of contract itself, or such as may reasonably be supposed to have been the contemplation of both parties, at the time they made the contract, as the probable breach of it. (*Page v. Pavey*, 8 Carr & Payne, 769; *Randall v. Ruper*, 96 E. C. L. [Ellis, Blackburn & Ellis] 83; *Passinger v. Thornburn*, 34 N. Y. 634; *Griffin v. Colver*, 16 N. Y. 489.)

CHAPTER X.

WARRANTY OF SOUNDNESS OF ANIMALS.

- § 130. What constitutes soundness and unsoundness.
- § 131. Meaning of the word "sound," in warranty of horses.
- § 132. The measure of unsoundness.
- § 133. Diseases which do or do not constitute unsoundness.

§ 130. What constitutes soundness and unsoundness.

—The word "soundness" occurs so frequently in the law treatises and decisions in matters of sale and warranty of animals, that its value as a descriptive term becomes important. It is applied to all domestic animals which come within the class known as "live stock"; but is used so much more frequently with reference to horses than other animals that, in order to arrive at a fair understanding of its value as a descriptive term, we are compelled to dwell upon, and go into full details in regard to, its significance and use as applied to them.

Mr. Youatt, in his work on "The Horse,"¹ gives the rule as follows: "The horse is unsound that labors under disease, or has some alteration of structure which does interfere with his natural usefulness. The term 'natural usefulness' must be borne in mind. One horse may possess great speed, but is soon knocked up; another will work all day, but cannot be got beyond a snail's pace; a third, with a heavy forehead, is liable to stumble, and is continually putting to hazard the neck of his rider; another, with an irritable constitution, and a loose, washy form, loses his appetite and begins to scour, if a little extra work is exacted from him. The term 'unsoundness' must not be applied to either of these; it would be opening far too wide a door to disputation and endless wrangling. The buyer can

¹ The Horse, by Wm. Youatt, 392.

discern, or ought to know, whether the form of the horse is that which will render him liable to suit his purpose, and he should try him sufficiently to ascertain his natural strength, endurance, and manner of going."

This definition does not appear fully to cover the ground taken by the ruling of the Courts: Mr. Youatt makes no mention, in his definition, of such alterations of structure as have resulted from accident, while the English rule, now well established, gives us the result of an abler and more diligent study of the subject; and from this rule we see that the disqualification for work, which renders a horse unsound, may arise *either* from disease or accident, and as said in an important English case, "a man who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being put to any fair work the owner chooses."¹

§ 131. The meaning of the word "sound," in the warranty of an animal, will depend upon local custom and usage, as well as upon the circumstances of each case; and what the intention and understanding of the parties was, will be for the jury to decide.²

Mr. Chitty, in his work on contracts, says: "The rule as to an unsoundness of a horse is, that if, at the time of the sale, the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary

¹ *Kiddell v. Barnard*, 9 M. & W. 671; *Story on Sales*, Sec. 361. But the custom or usage must, by competent testimony, be shown to be uniform; and even an occasional practice, tolerated to a certain extent, in a certain department of business for any given year, can only be established by proof of specific instances within the designated period. (*Chenery v. Goodrich*, 106 Mass. 566.) A usage of trade, however local and partial, will govern a contract proved, or legally presumed, to have been made with reference thereto. (*Appleman v. Fisher*, 34 Md. 540.)

² *Lewis v. Peake*, 7 Taunt. 153; *Atterbury v. Fairmauer*, 8 Moore, 32; *Hutchinson v. Bowker*, 5 Mees. & W. 535; *Hart v. Hammett*, 18 Vermont, 127. In this case, p. 130, in the opinion of the Court it is said: "The object of admitting proof of usage in such a case is, that effect may be given to the contract according to the intent of the parties. Can there be any sound objection to the defendant's showing, by parol, the sense in which the terms were in fact used by the parties when making the contract?"

effects will, diminish the natural usefulness of the horse, such a horse is unsound.”¹

Another standard author says: “When a horse is warranted ‘sound,’ any infirmity, which renders it less fit for present use and convenience, is an unsoundness within the meaning of such a warranty, and it is not necessary that the infirmity should be of a permanent nature.”²

§ 132. The measure of unsoundness, and the question of whether the infirmity is of a permanent character, cannot be regarded in ascertaining whether there has been a breach of a warranty that the horse is sound; the word “sound,” when put into a contract, has a purpose to fulfill; it must be understood to mean what it expresses—that is to say, that the animal is sound and free from disease of any nature such as would impede the natural usefulness of the animal.

If the disease, the unsoundness, be slight and easily cured, the damages upon a suit for breach of warranty would be small, but it would be unsafe to measure the extent of the defect in the first instance, when regarding the question of whether the breach of warranty has occurred.³

The names and descriptions of the several diseases which have come to be regarded as unsoundness may perhaps more properly belong to a work on veterinary surgery than to a law book, but the Courts having adjudicated in some instances, it cannot be amiss to follow them.

§ 133. Diseases which do or do not constitute unsoundness.—A vice, technically, is a bad habit, of such a character as to materially and injuriously affect the animal to such an extent as to impede his natural usefulness for the purpose for which he is used or intended; soundness and freedom from vice are so often and naturally mentioned and regarded in conjunction as to render it proper so to treat them; and as a detailed list of the various diseases, defects, and vices of ani-

¹ Chitty on Contracts, 464.

² Story on Sales, Sec. 362.

³ Kindell v. Burkhard, 9 Mees. & W. 668; Coates v. Stephens, 2 Mood. & Rob. 157; Ellton v. Brogden, 4 Camp. 281.

mals, in alphabetical order, is as convenient a mode as any in which to present the subject, such a course is pursued.

Asthma causes a short, soft cough in horses, and is easily recognized. It more seriously affects the animal in cold than in warm weather; frequently the attack is slight and the disease not very serious, but, there being a chronic disease, predisposing to lung diseases, horses affected by asthma are regarded as unsound.¹

Abrasions are unsoundness until perfectly healed.²

Backing and gibbing, or baulking, are generally the result of bad breaking. When the habit becomes confirmed, it is said to be impossible permanently to cure a horse of this bad habit, and it is one which constitutes a breach of warranty of "freedom from vice," as it is dangerous, and diminishes a horse's natural usefulness.³

Biting, when dangerous, is a vice. Crib-biting is not such an unsoundness as to entitle a purchaser to recover under a general warranty,⁴ but it does constitute a breach of warranty that the animal is free from vice.

Blindness is undoubtedly an unsoundness; but where cloudiness of the eye or opacity of the lens occurs after the sale, to constitute a breach of warranty it must appear either that

¹ Hanover on Horses, p. 57.

² Ibid.

³ Oliphant's Law of Horses, p. 70.

⁴ Story on Sales, Sec. 362. But see Washburn v. Cuddihy, 8 Gray, 430.

In *Margetson v. Wright*, 5 Moore & P. 600, was sale and warranty, peculiar in this: the vendor informed the buyer that the horse, a racer, was a crib-biter; the horse had a splint, which was quite apparent at the time of the sale; notwithstanding these two defects, the vendor warranted that the horse was sound, wind and limb; this warranty was held not to extend to those two defects, one of which was patent and the other declared by the vendor. The general rule has come to be considered that if a party buys an animal, knowing it to be blind, or subject to some other confessed unsoundness, he cannot on account of the defect, of which he was aware, recover on a warranty that the animal was sound, the reasoning being that one cannot rely on a warranty that an animal is sound when he knows the contrary to be the truth. (*Margetson v. Wright*, 7 Bing. 605; *Mellish v. Motteaux, Peake*, N.P. 115; *Schuyler v. Russ*, 2 Caines, 202; *Fisher v. Pollard*, 2 Head, [Tenn.] 314.)

But, in a like case, (1860) *Pinney v. Andru*, 41 Vermont, 631, it was held that a party may warrant against an obvious and patent defect as well as against any other.

there was inflammation before the sale, or by proper testimony by veterinary surgeons that there must have been inflammation before the time of sale.¹

Blood and bog spavin is caused by overstrain upon the tendons of the leg, making an enlargement of the little bags at their ends, such as wind-galls and thorough-pins; when the blood-vessel of the limb which passes over this bag becomes distended with blood, this defect becomes blood-spavin.

This disease, in its various forms, usually produces lameness and constitutes unsoundness.²

Bone-spavin is always regarded as unsoundness, whether it produces lameness at the time of sale or not.³ This disease is an affection of the hock-joint. An inflammation is caused by too great weight thrown upon, or by a concussion which strains, the inner splint-bone; this inflammation affects the cartilaginous substance which unites this inner splint-bone to the shank-bone, so that the cartilage is absorbed, and the union between the splint-bone and shank becomes bony and inflexible to such an extent as to destroy the elastic action between them. A splint in the form of a tumor appears on the inside of the hind leg, in front of the union of the head of the splint-bone with the shank; it is this which is generally denominated a bone-spavin. Almost without exception it ultimately produces serious lameness, and, with hard, straining, or quick work, the enlargement spreads rapidly and interferes with the flexion of the hock.

“Broken-backed,” caused, ordinarily, by a horse having been worked too young, is where some of the bones of the back or loins become ankylosed, being united together by bony matter, instead of ligaments; the animal becomes unwilling to lie down, or, when down, to get up; turns with difficulty in the stall, and is generally awkward and unwieldy; manifesting lack of elasticity in movement, and especially under the saddle; when in this condition, the horse is said to be “broken-backed,” or “chinked in the chine,” and where the injury is grave enough

¹ Oliphant's *Law of Horses*, p. 72.

² *Ibid*; *Watson v. Denton*, 7 C. & P. 86; *Law of Horse*, by Hanover, p. 57.

³ *Ibid*.

to become apparent, and to impair, as indicated, the natural usefulness of the animal, he is deemed unsound.¹

Broken knees do not constitute unsoundness, after the wounds are healed, unless they interfere with the action of the joint; and a horse may fall from mere accident, or through the fault of the rider.²

Broken wind is the rupture, or running together, of some of the air cells; the breathing is by one effort of inspiration, with two of expiration, the latter occupying about double the time of the former; the peculiarity may be observed by regarding the flank of the animal, and watching the respiration. It is, confessedly, an unsoundness,³ as it is incurable, although it does not materially unfit the animal for the race-course or the hunting field, except on a cold or foggy day.

Bronchitis.—The division of the wind-pipe, just before it meets the lungs; the bronchial tubes become inflamed; this inflammation is called bronchitis, and is characterized by quicker and harder breathing than catarrh usually presents, and by a peculiar wheezing, which is relieved by the coughing up of mucus; it is, in effect, catarrh, which has extended to the entrance of the lungs, and it is undoubtedly unsoundness.⁴

Bleeding may cause such a material blemish as to constitute unsoundness, so long as the blemish (generally a large, unsightly knot, or lump, on the neck-vein) continues.

Bald or bare places on an animal seldom deserve regard in this connection; they are unsightly, and might be classed as "blemishes," but do not rise to the dignity of unsoundness, unless it be, in a saddle-horse, that the baldness is but an indication of a serious scald, only superficially healed over.

¹ Hanover on Law of Horse, pp. 58-9; Oliphant's Law of Horses, pp. 73-4; *Id.* 74.

² *Atkinson v. Horridge*, Veterinarian, Vol. 22, p. 452; *Sympson v. Davis*, *Id.* 528, 438.

³ Oliphant's Law of Horses, p. 74; Hanover on Horse, p. 62.

⁴ *Id.* pp. 63-4; Oliphant, p. 102. This author, speaking of strangles, says: "Strangles are peculiar to young horses, almost all of which have it once. It is quite different from glanders, though they have sometimes been confounded. In its early stage it resembles a common cold, and is accompanied with sore throat. It is not dangerous, and is unsoundness only during the time the horse is ill with it."

But in his work on sales, Sec. 362, Mr. Story regards strangles as unsoundness, *prima facie*, and that the warrantor must take the affirmative to prove that the attack is of but a temporary character.

Bar-shoes, constantly required, indicate such a condition of the hoof as to constitute unsoundness; for if there have been sand-cracks, corns, thrushes, or anything of that character, which remain uncured, so that the constant use of bar-shoes is a necessity, the horse is not sound.

Bandages, also, when constantly needed, manifest such a reliance on these aids and supports as is inconsistent with soundness.

Bastard strangles, or vives, generally occurs when a horse has not had the strangles at the usual time. The original disease, "strangles," is not dangerous; but in horses fully matured, "vives," which really means a revival of the attack, and is commonly known as bastard strangles, is difficult of cure, and unless properly treated, in an efficient manner, may run into broken wind, or even glanders; so that vives, or bastard strangles, is generally considered unsoundness, while the original disease, strangles, is not so regarded, except while the horse is actually ill with them.

Bent-before—that is to say, when overwork, pain in the feet, or "flat feet" have caused the fore-legs to bend forward at the knees—is unsoundness.¹

Canker is a separation of the horny part of the hoof from the sensitive part of the hoof, and the growth in the interstice of fungous matter, which sometimes spreads over the whole frog. It is caused by bruise, puncture, corn, or thrush; is very difficult to cure, and is unsoundness.²

Capped hocks is sometimes the result of lying on an uneven floor, or by kicking in the stall; they are not classed as *unsoundness*, but, when caused by kicking, are occasionally rated a *vice*. In many instances, however, capped hocks are the consequence of a sprain or enlargement of the hock; when so, they are an unsoundness.³

¹ Hanover on the Horse, p. 64. When, however, there is no pain, and the deviation from the natural line is but slight, and the animal can properly do his work, it is not unsoundness.

² Oliphant's Law of Horses, p. 75.

³ Ibid; Hanover on Horse, p. 66. "Thrushes, neglected, will turn to canker. This disease of the hoof is easily detected, and is very troublesome to cure. A cankered horse is unsound."

But in a note to Appendix of Lib. W. K. "The Horse," Ed. 1863, 522, an opinion is given that it is not an unsoundness, on the ground that it is never occasioned by strains, and is therefore no more than a blemish.

Chest-founder, or, as it was formerly called, *anticor*, is a tenderness about the muscles of the breast, with occasional swelling, and after a time there becomes apparent a shrinking of the muscles of the chest. It is evidently an unsoundness.¹

Cataract is unsoundness. (See Blindness.) So also is cloudiness of the eye, as it is almost sure to end in complete opacity of the lens, cataract, and blindness.

"Chinked in the chine" is synonymous with "broken-backed."

Contraction is where the foot loses its circular form, becomes long and narrow, especially at the heel; it is not necessarily unsoundness, but may become so if lameness results therefrom.²

Corns are seldom radically cured. They materially interfere with the natural usefulness of the animal, and are an unsoundness.³

Cough is generally subdued without much difficulty when resulting from catarrh or common cold; yet it is now the law, as settled by the later English authorities, that if the horse had at the time of sale a cough, whether *permanent* or *temporary*, it constitutes a breach of the warranty of soundness.⁴

¹ Hanover on Horse, p. 68; Oliphant's Law of the Horse, p. 76; Atterbury v. Fairmauer, 8 Moore, 32. Chest-founder was for a long time confounded with rheumatism; but it is now ascertained to be a result from navicular disease, which, preventing the fore-legs from being exercised to the same extent as before, produces an absorption of the muscles of the chest. Anticor is distinguished from chest-founder, and generally considered as being an abscess of the brisket.

² Hanover on the Law of Horses, p. 65; Oliphant's Law of Horses, p. 76. Lameness usually accompanies the beginning of contraction, and when contraction continues to exist for any considerable length of time, lameness almost invariably results therefrom.

Contraction may be caused by neglect of paring, by suffering the shoes to remain on too long, by want of the natural moisture because of the feet having been kept too dry, or by thrushes; but these last are more often the result from rather than of contraction. The cause of that contraction, however, which most often produces lameness of a permanent character, is an inflammation of the little plates which cover the coffin-bone, but not sufficiently intense to be characterized as acute founder. (Bywater v. Richardson, 1 Ad. & E. 508.)

³ Oliphant on the Law of Horses, p. 77; Hanover, pp. 68-9. In the angle between the bars and the quarters, the horn of the sole has sometimes the appearance of being red and spongy; the horse shows pain when the spot is touched, and, if the matter be neglected, so much inflammation is produced that supuration follows, and is succeeded by *quittor*, and the matter either undermines the horny sole or is discharged at the coronet. Corns seldom appear on the hind feet. In any situation, they are very seldom radically cured, though temporary relief may be obtained, and manifestly constitute unsoundness.

⁴ Elton v. Brogden, 4 Camp. 281. Lord Ellenborough said: "While a horse has a cough I say he is unsound, although that may be only temporary or may

Curb is an enlargement at the back of the hock, about three or four inches below the point; it is caused by an exertion of more than usual violence, or by a spring, or sudden jar. A horse with a curb, at the time of the sale, is unsound, within the line of a general warranty, but if it throw out a curb immediately after sale it is no breach of the warrant.¹

Cutting is not a vice or a breach of warranty, although a serious annoyance; the buyer generally, with a fair share of prudence, can detect the signs of the habit, and the rule *caveat emptor* applies.²

Dropsy is of two kinds, that of the skin, and of the heart; in the former, dropsical swellings most frequently appear on the chest and fore-legs; they are results of weakness from other diseases rather than a distinct malady, and sometimes owe their existence to the debility which accompanies the change of coat in the spring of the year; the latter is where the pericardium of the heart becomes inflamed, the secretion of the pericardium is increased, and so much fluid accumulates as to obstruct the beating of the heart. Dropsy of either kind is unsoundness.³

Enlarged glands often appears with catarrh, and almost always with any serious affection of the chest, and most commonly remains after the cold or fever has disappeared. If the enlargement is considerable and tender, if the gland at the root of the ear partakes of it, and the membrane of the nose presents an unusually red appearance, the commencement or lurking of some insidious disease is to be feared; and a horse under such circumstances should be deemed unsound.

Enlargement of the hock so materially affects the complicated structure of the hock-joint, that although the horse may appear to work well for a considerable time, he will become lame, most commonly on a few days' hard work.

A decided case of enlarged hock is an unsoundness, unless it is a mere blemish, the result of external injuries.⁴

prove mortal. Any infirmity which renders a horse less fit for present use and convenience is an unsoundness." (*Coates v. Stephens*, 2 M. & Rob. 157.) But see *Bolden v. Broyden*, 2 M. & Rob. 113.

¹ *Hanover on Law of Horses*, p. 69; *Dickenson v. Follett*, 1 M. & Rob. 299.

² *Eaves v. Dixon*, 2 Taunt. 343-5; *Oliphant's Law of Horses*, pp. 84-6; *Ibid*.

³ *Ibid*, pp. 84-5.

⁴ *Dickenson v. Follett*, 1 M. & Rob. 299. And even if, at the time of sale and warranty, the horse showed curby hocks, i. e., a peculiar form of hocks in-

False quarter is a serious defect and frequent cause of lameness; it is exceedingly difficult to remedy, and must be considered an unsoundness.

Farcy, which is a disease of the absorbents of the skin, is an unsoundness; it is a type of the disease which in its different stages is farcy or glanders. The symptoms of the two are not similar, but the maladies differ in their results and effects only in that glanders is generally incurable, while farcy, in its early stage, or mild form, may be successfully treated. Water farcy is dropsical affection of the skin, either of the chest or the limbs generally, and is also an unsoundness.

Fever in the feet, or acute founder, is so liable to render a horse permanently lame as to constitute unsoundness.¹

Glanders is the worst of all diseases for the horse; it has been known more than fifteen hundred years, and no cure has been found for it. It is an unsoundness, of course.² The moment of the incipency—that is, if he really have the seeds of it in him—the animal is unsound, although it may be some time before the disease becomes fully developed.³

Glancoma is a dimness of sight from an opacity of the vitreous humor; it is not easily distinguished to exist, and can only be discovered by a very attentive examination of the eye; it clouds the sight, and is unsoundness.⁴

Goggles has been held to be unsoundness in sheep; it is generally believed to be caused by too close breeding, and no means are known for discovering its existence until it shows itself by the death of large proportions of the flock.⁵

dicative of coming curbs, sometimes called cow hocks, from a resemblance to those of cows, in that the hocks turn inward and the legs form a considerable angle outward, so that the angular ligaments are continually on the stretch to confine the tendons. (*Brown v. Elkington*, 8 M. & W. 132.)

¹ This is caused generally by leaving a horse in a draft, or where it is cold, after violent exertion; a fever in the feet is the result; this is difficult to subdue, and sometimes leaves fearful consequences, such as loss of the hoof, or permanent injury. (*Lib. U. K. "The Horse,"* 290.)

² The presence of glanders is first marked by a discharge from the nostrils, or one of them, differing from that of catarrh in that it is usually lighter and clearer in its color, and more glutinous, or sticky. It is not discharged occasionally and in large quantities, like the mucus of catarrh, but is constantly running from the nostril. (*Olliphant on the Law of Horses*, p. 85.)

³ *Woodbury v. Robins*, 10 Cush. (Mass.) 520.

⁴ *Settle v. Gamer*, N. P. 1857; *Westminster Farrier Assizes*, 1857.

⁵ *Joliff v. Benedict*, R. & M. 136.

Gutta levena, commonly known as "glass eye," is a species of blindness, and is an unsoundness.¹

Kicking in the stall is sometimes a vice, but not such a habit as to be classed as unsoundness; it is more common to mares, and results from irritability rather than viciousness; kicking in harness is a vice, without doubt, and is a habit of which horses are seldom cured; it sometimes is the result of playfulness, and, not being a habit, disappears.²

A kidney-dropper will appear quite well at starting, but after traveling a short distance will come to a dead standstill; a kidney-dropper is worthless and unsound.

Lameness, whether temporary or permanent, is an unsoundness; it is impossible to say how long it may continue, and the rule given by Lord Ellenborough, that any warranty of soundness is broken if the animal, at the time of sale, had any infirmity upon him which rendered him unfit for service, and so the learned judge declares that lameness is such an infirmity.³

Laminitis is an inflammation of the medium which connects the coffin-bone with the inside of the hoof; the toe becomes tender, is favored, the horse puts his heel to the ground first, and goes short; lameness ensues, and laminitis is unsoundness.⁴

Lampas is a fullness in the mouth of young horses, caused by a swelling of the lower bars of the palate; they become sore, and the animal, therefore, feeds badly; they are unsoundness only during their continuance.

Liver diseases constitute unsoundness, as a diseased liver leads to such complications of maladies as necessarily interfere with the usefulness of the animal.⁵

All diseases of the lungs are also unsoundness, for the same

¹ The pupil becomes dilated, is immovable, bright, and glassy; it is palsy of the optic nerve; it may be caused by improper treatment of the staggers, or by any treatment, or other means, which induces a rush of blood to the head.

² In Wisconsin a man allowed a person, to whom he was trying to sell a horse, to try him in harness; the vendor knew that he was excitable and liable to kick; he did so, and the Court held that the vendor was responsible for the damages. (*Smith v. Justice*, 13 Wis. 600.)

³ *Elton v. Broyden*, 4 Campb. 281; *Elton v. Gordon*, 1 Stark. N. P. C. 127; *Gawnent v. Bass*, 2 Esp. 673.

⁴ *Hall v. Rogerson*, before Mr. Baron Alderson, New Castle Spring Assizes, 1847; *Oliphant*, p. 444; *Smart v. Allison*, *Ibid*, 450.

⁵ *Hanover on Law of Horses*, p. 81; *Buckingham v. Rogers*, *Oliphant*, 455.

general reason ; they constitute an infirmity within the rule of impairing the usefulness of the animal ; given in *Elton v. Brogden*, Ante.

Mallenders, or sallenders, is a scurfy eruption at the bend of the knee, or inside the hock, or a little below it ; seldom produces lameness, but, if neglected, a discharge sets in, which it is difficult to stop ; it is classed as unsoundness.¹

Mange is marked by pimples and eruptions on the skin, which are followed by blotches, which finally become scabs ; it is not only unsoundness, but is the most contagious of all diseases to which animals are liable.²

Navicular joint disease is caused by rapid, irregular, and violent exercise, or from sudden jar or concussion ; it produces lameness, which is seldom cured ; it is unsoundness.³

Nerving is an operation upon the leg of a horse to cure an organic defect, by depriving the animal of a diseased nerve, which relieves a peculiar pain in the foot. An animal which has been nerved is unsound.⁴

Nasal gleet is a continued discharge of the fluid secreted to lubricate the membranous lining of the nose ; it may be green, or straw-colored, depending upon whether his feed is grass or hay, and is sometimes brown, or even bloody ; it may last for months, and sometimes destroys the animal ; it is unsoundness.⁵

Ossification of the cartilages, or "side bone," is an unsoundness, whether it produces lameness or not, as it is an organic

¹ Oliphant, *Law of Horses*, p. 90.

² Ibid.

³ "Navicular disease" was described in *Bywater v. Richardson*, 1 A. & C. 508, as an inflammation in a joint on the inside of the hoof, and to be of such a nature that it might be alleviated by proper treatment, so far as to render a horse fit for gentle work, and to make him appear sound for a time, and on soft ground ; but could seldom, if ever, be permanently cured so as to qualify him for hard work.

⁴ *Best v. Osborne*, R. & M. 290. On the trial, it was shown that the operation of nerving consisted in the division of a nerve leading from the foot up the leg ; that it was usually performed in order to relieve the horse from the pain arising from a disease in the foot, the nerve cut being the vehicle of sensation from the foot ; that the disease in the foot would not be affected by the operation ; that horses previously lame from the pain of such disease would, when nerved, frequently go free from lameness, and continue so for years ; but that the presumption was that the horse could not endure hard work, and was unsound after nerving.

⁵ Oliphant's *Law of Horses*, p. 92.

defect, which is liable, at any time, to culminate in serious lameness.¹

Over-reaching, clicking, or striking the hind-shoe against the fore one, is not unsoundness, as the habit does not impair the natural usefulness of the animal, unless where the striking is the result of a peculiar formation amounting to an organic defect, in that the legs are too long for the body, when the animal is liable, with his hind-feet, to step on the heels of his fore-feet, and throw himself; in such cases, striking indicates such a malformation as constitutes unsoundness.²

Parotid gland ulcerated.—This gland is in the hollow which runs from the root of the ear to the angle of the lower jaw. In bad strangles, and sometimes from cold, this gland will swell greatly, and ulcerate, and sometimes a fistulous ulcer is formed, very difficult to heal. Such a disease is an unsoundness.

Poll evil.—At the point of juncture of the head and bone nearest the skull, an ulcer is formed by the horse rubbing and sometimes striking his "poll" against the manger, or by hanging back on the halter, and so causing an abrasure, or by a blow. A swelling appears, which is hot, tender, and painful, and after a time matter is formed, and spreads around, and eats into the neighboring parts. This is an unsoundness.³

Pumiced feet.—The sensible and horny plates of the foot, after an attack of the rheumatism, become elongated and partially separated, and do not unite again readily, and often lose their elasticity; the coffin-bone, lacking their support, presses on the sole, which thus becomes rounded out, or convex, and reaching the ground, gets bruised and sore. This is "pumiced feet," and is an unsoundness.

Paralysis is the loss of the use of any limb, or function, through injury to the brain, nerves, or muscles. Animals subject to it are sometimes attacked while traveling rapidly, lose momentarily the use of a limb, and shortly afterward recover it, and are apparently as well as ever, but are, nevertheless, unsound.

Quittor is the result of neglected or bad over-reaching, or any

¹ Hanover on Law of Horses, 86-7.

² Brown v. Elkington, 8 M. & W. 132; Dickenson v. Follett, 1 M. & Rob. 299.

³ Hanover on the Law of Horses, p. 88; Oliphant, p. 94.

wound on the foot. In the natural process of ulceration, matter is thrown out from the wound and forces the small plates of the coffin-bone from the horny crust of the hoof, and sometimes eats into the fleshy part of the foot. These ulcerations form a kind of pipes, or sinuses, running in every direction, and constitute the disease called quittor, which is an unsoundness.

Rat-tails, an excrescence on the back part of the leg, giving a peculiar, twisted appearance to the hair, whence is derived its name, is generally harmless, and not an unsoundness.

Rearing, when the habit becomes established, or is not due to temporary causes, such as needless pulling at and laceration of the mouth, is an inveterate, bad, dangerous habit—is a vice; and the maker of a warranty that a horse is gentle and free from vice, when the animal has this habit, should be held liable.

Ringbones are situate above the hoof, and are a hardening or ossification of the cartilages at the top of the coronet; when visible only in front of the pastern it is generally of little consequence, but where it is near the heels it is more serious, as there it impedes the flexibility of the cartilages. It is generally regarded as an unsoundness,¹ whether it produces immediate lameness or not.

Rumbling is not an unsoundness, but rather a mark of good health.²

Roaring takes its name from a peculiar sound uttered, when briskly traveling, by a horse affected; it is caused by a tough and viscid substance thrown out in the shape of fluid, and which sticks to the larynx and upper part of the wind-pipe, materially obstructing the passage; the malady is always rated unsoundness if it proceed from an organic defect, but if it is but a temporary effect from strangles, or other usual condition in a colt, it is not considered so.³

¹ Hanover on the Law of Horses, p. 90; Oliphant, 94-5.

² This is frequently, but erroneously, confounded with "washy," it being thought that the noise is from water in the intestines; but, in fact, the noise is from the sheath, hence mares never make this noise. Horses of this habit are not inconvenienced, but are, for the most part, good, round-barrelled horses, and sound. (Hanover, p. 90.)

³ "Roaring or whistling in horses is an unsoundness within the meaning of the warranty that the animal is sound in every respect." (Southard v. Haywood et al. Supreme Court Penn. Nov. 19th, 1874.)

"There was ample evidence that roaring or whistling in horses is a disease arising from the state of the wind-pipe or air-passages. The Court submitted

Running away, or bolting, is decidedly a vice, and, when the habit becomes confirmed, renders the horse dangerous and without value.

Saddle-galls may or may not be unsoundness: if not of a nature to impede the use of the animal, or of a slight, temporary character, they are not so; but if of long standing, and worked deep into the back, they make a very bad sore, worse sometimes than "poll evil," when they become "sit-fasts," and are an unsoundness.¹

Rheumatism can only be discovered when the horse is palpably lame, when, of course, he is unsound; and so, when it can be proved that, within a reasonable length of time before the purchase, the animal was lame from this cause, he may be returned under a general warranty of soundness; so, too, where the disease is chronic.²

Sallenders constitute unsoundness. (See mallenders.) When the fore-leg is affected it is mallenders, and sallenders when in the hind-leg.

Sand-crack is a crack or division of the hoof downwards; it generally indicates brittleness of the crust, which is sometimes natural, but more often the result of mismanagement or disease, particularly of "false quarter."

Sand-crack is unsoundness; but, as in the case of a curb, if a horse, without any previous indication of previously having had the disease, throw out a sand-crack immediately after the sale, it is no breach of a warranty of soundness.³

the fact of its existence in the horse to the jury; and if so, then instructed them that it was an unsoundness within the scope of the warranty. This was the meaning and effect of that portion of the charge assigned for error. We discover no error in the instruction. The Court did not undertake to pass on the disease as a fact." (Ibid; Story on Sales, Sec. 362; Bassett v. Collins, 2 Campb. 523; Onslow v. Eames, 2 Stark. N. P. C. 81.)

¹ In *Kiddell v. Barnard*, 9 W. & M. 670.

² *Couch v. Culbreth*, 11 Rich. (Law) 9. In this case, it was held that, in questions of unsoundness, where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed. As to what constitutes "organic disease," and its presence, this case will repay perusal, but a medical treatise is not within the scope of this work. It is always for the jury to determine whether such a disease affects the animal to an extent sufficient to impair his natural usefulness.

³ *Olphant's Law of Horses*, p. 98.

Shying is a habit not affecting the question of soundness, but coming under consideration upon a warranty that the horse is free from vice. Generally, it is the result of cowardice, want of work, or playfulness, and not unfrequently from recollection of ill usage, as when the animal shies on coming from the stable. When the habit becomes confirmed it is a vice, and one replete with danger.

Shying sometimes results from defective sight, when it becomes unsoundness.¹

Sidebones is the same disease as ossification of the cartilage. A lameness ensues, which may disappear with rest and care, but any quick work, or fast travel on a hard road, will bring it back. It is an unsoundness, whether it produces lameness or not.

Spavin is an unsoundness. (See bone, blood, and bog spavin.)

Speedy-cut is where, at high speed, the horse strikes on the inside of the leg, immediately under the knee, and thence to the head of the inner splint-bone; this is the result of defective shape, and hence is not an unsoundness.

A splint, like a bone spavin, is an excrescence, or bony deposit on the horse's leg; lameness therefrom is caused by preventing the proper flexion of the joint. The position of the splint determines whether or not it constitutes unsoundness; if not in the neighborhood of any joint, so as to interfere with its action, and if it does not press on any tendon or ligament, it is no unsoundness; but the splint which is where it does interfere with the proper movement of the joint, tendon, or ligament, is unsoundness.²

Sprain and thickening of the back sinews is where, from over work, the tendons of the back press over much on the delicate lining of the sheath, or cover of the tendon, and thence ensues inflammation, and coagulations are formed between the tendon and sheath. A slight strain of this character is called sprain of the back sinews or tendons, and when more serious it

¹ Holliday v. Morgan, 28 L. J. Q. B. 9; 2 Oliphant's Law of Horses, p. 100.

² Margetson v. Wright, 1 M. & W. 622. The Court says: "It now appears that some splints cause lameness and others do not, and that the consequences of a splint cannot be apparent at the time, like the loss of an eye, or any other blemish or defect visible to a common observer. We therefore think that, by the terms of this written warranty, the parties meant that this was not, at that time, a splint which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the warranty was broken."

is said that the horse has broken down. Either is an unsoundness, as an alteration of structure has occurred which must impair the natural usefulness of the horse.

Star-gazing, and its inseparable defect, called ewe-necked, are natural defects in the formation, and hence are neither unsoundness nor vice.

Strangles, although sometimes confounded with glanders, is very different from it; it is but a natural condition for young horses, and is no unsoundness, save when the animal is sick with it.

String-halt is a peculiar movement of the hind-leg, owing to irregular nervous action; it wears off with exercise, and is generally characteristic of high-bred animals. Much difference of opinion has prevailed on the question of whether or not it was unsoundness, but the later English authorities decided it to be so.¹

Thickwind is shown by short, frequent, and labored breathing when in rapid motion. It frequently is observable in round-chested, fat horses; heavily built horses generally show it, and it is especially to be observed in horses unused to violent exertion on a full stomach. The chief cause is, however, previous inflammation of the bronchial passages; it is often the forerunner of broken wind, and when it proceeds from inflammation it is an unsoundness.²

Thin soles are not necessarily an unsoundness, and they must be shown to have produced lameness to be so regarded.³

Thrush is the inflammation of the lower surface of the inner or sensitive frog; if neglected, it leads to a diminution of the substance of the frog, and this may be followed by a separation of the horny part of the hoof from the parts beneath, and the production of fungus and cancer, and ultimately the result is a diseased condition of the hoof, destructive of the present and dangerous to the future usefulness of the horse. A thrush is an unsoundness.

¹ *Thompson v. Patterson*, Oliphant, 102.

² *Oliphant's Law of Horses*, 104.

³ *Bailey v. Forrest*, 2 C. & K. 131, which is put on the ground of *Brown v. Elington*, in which it was held that "curby hocks," not producing lameness at the time of sale, were not a breach of warranty of soundness, though a curb was afterward thrown out; and from this case the Court says: "This case shows that the mere fact of the horse in question being thin-soled at the time of sale is not sufficient to constitute a breach of warranty of soundness."

Tripping is a habit, not an unsoundness—not necessarily a vice, as it generally is a habit resulting from malformation, in that the fore-legs are too much under the horse.

Vicious horses, in that they are hard and mean to groom, are generally so from having been ill treated, or from their being tender-skinned to a degree that makes them irritable. This may be overcome by kindness; but, so long as it exists to such a degree as to make the horse dangerous, it is a *vice*.

The same reasoning is applicable to horses vicious to shoe, except that this is more rare; but if it is dangerous to shoe a horse, he is “not free from vice.”

Weak-foot is caused by disease, as a rule, although it is sometimes the result of a natural malformation of the foot. Horses subject to this weakness can never stand much hard work; they will be subject to corns, bruises, convexity of the soles, and breaking away of the crust.

When it is the result of malformation, it is not unsoundness; when caused by disease, it is.

Weaving is a bad habit, and is rated a *vice* when it either injures a horse's health or makes him dangerous.

A wheezer is not unlike a person affected by asthma. It is a kind of *thick wind*, caused by the lodgment of some mucous fluid in the small passages of the lungs. Wheezing is heard constantly, and therein differs from *roaring*, which is confined to the increased breathing during considerable exertion. Wheezing is unsoundness.¹

Whistling is much the same as wheezing, but in that the sound is more shrill, and is heard only when the horse is in motion; it appears to be referrible to some contraction in the wind-pipe or larynx; it is rated an unsoundness.²

Washy is a term applied to a horse when the least exertion produces in him purging, looseness, etc., the cause being irritation of the intestines; such a horse can do but little work, and is classed as unsound.³

Wind-galls.—But few horses are quite free from these, but they only produce lameness when numerous or unusually large.

¹ Oliphant's Law of Horses, 106.

² Ibid; Hanover on Law of Horse, 98.

³ Anslow v. Eames, 2 Stark. N. P. C. 81.

Like thoroughpin, they are not unsoundness unless lameness is caused by them, or when they are so large and numerous as to indicate that lameness will probably result from them.¹

Wolf's teeth is but a temporary malady, generally easy to cure by drawing the tooth, and is only unsoundness while the extra tooth makes the mouth sore.

Yellows, or jaundice, is a bilious malady, generally caused by an obstruction of the ducts or tubes which convey the bile from the liver to the intestines. While the illness lasts, it is an unsoundness.

¹ Hanover, p. 98; Stuart v. Wilkins, Doug. 18.

CHAPTER XI.

THE LAW AS TO HORSES.

- § 134. Legal ethics as to horses.
- § 135. Horse-breakers and trainers, their duties and rights.
- § 136. Care and skill required of horse-breaker or trainer.
- § 137. Lien of horse-breakers and trainers.
- § 138. Lien of "stander" of stallions.
- § 139. Veterinary surgeons, their duties and rights.
- § 140. Malpractice by veterinary surgeons.
- § 141. The veterinary surgeon has a lien.
- § 142. Farriers, their rights and liabilities.
- § 143. Lien of a farrier.

§ 134. Legal ethics as to horses.—Because of the high place, among domestic animals, which the horse deservedly holds in man's esteem, the manifold uses to which he is applied, and his value as property, it has naturally occurred that, in regarding the subjects of hire, lending, sale, warranty, soundness, etc., of animals generally, the horse has occupied a prominent position, and hence, so far as the topics already commented upon are concerned, but little, if anything, remains to be considered as specially referring to horses; but there are some matters of legal study and reasoning, which, to a greater or less extent, are peculiar and especial to them, and the business relation of men to one another in matters pertaining to these animals.

§ 135. Horse-breakers and trainers, their duties and rights.—Horse-breakers and trainers, in the matters pertaining to their avocation, and those persons who employ them therein, are subject to the general rules which govern the hire of labor and services, unless, by contract, the parties bind themselves by special agreements; and it is only in the absence of express stipulations that laws of general application take effect and furnish the terms of the contract by implication.

On the part of the person who employs the trainer to break his horse, or train it for service, the general duties imposed on him by law, and which, in the absence of express stipulations to the contrary, he is presumed to have agreed to, are: 1st. To do everything, on his part, to enable the workman to accomplish the object had in view; 2d. To hide no defects, peculiarities of temperament, or any circumstance which would render the task imposed and accepted peculiarly difficult or dangerous; 3d. To accept the animal when duly broken or trained as stipulated; to conform to the terms of his contract, and pay the price agreed upon, or, if none had been settled, a fair remuneration.¹

The person who contracts to break or train the animal is bound to exercise due and proper care of him, must answer for ordinary neglect of the horse, and apply a degree of skill equal to his undertaking.

Every man who assumes a task wherein is required peculiar skill or learning, stipulates that he possesses those qualifications; the law implies a contract, on his part, that he can and will perform the service skillfully; his relation to the employer is one of confidence reposed in him, based upon the belief that he is competent to perform the designated service; and if he is not competent, or fails to properly apply his skill or learning, he becomes responsible for damages which may ensue by his breach of the contract.²

§ 136. The care and skill required of a trainer or horse-breaker.—What degree of care, skill, or diligence the breaker or trainer is bound to exercise, depends upon the circumstances of the case, and the purpose contemplated by the parties in making the contract.

As to the care of the animal, the general rule of bailments governs. When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and makes him answerable only for *gross* neglect. When the

¹ Story on Bailments, Sec. 425.

² Howard v. Grover, 28 Me. 97; Rogers v. Grothe, 58 Penn. 414; Stanton & Little v. Bell & Joiner, 2 Hawks. 145; 2 Kent's Com. 588. "Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. If he performs the work unskillfully, he becomes responsible in damages." (Ritchey v. West, 23 Ill. 385; McNevin v. Low, 40 Ill. 210.)

bailee alone is to be benefited, he is bound to exercise extraordinary care, and is responsible for *slight* neglect. When the bailment is reciprocally beneficial, and both parties are to derive advantage, the law requires *ordinary* diligence, and makes the bailee responsible for *ordinary* negligence.

This contract for breaking or training a horse, being of mutual benefit, the bailee is not answerable for slight neglect, nor for a loss of or injury to the animal while in his charge, by reason of inevitable accident, irresistible force, theft, or from any inherent disease, fault, or vice of the horse itself.¹

§ 137. **As to the lien of a horse-breaker or trainer** on the animal for his fees, there appears to be some conflict of authorities. By an early English case, it is held that he has such a lien for his fees and charges on the express or implied contract; by his skill the horse is rendered valuable, and changed from a source of expense, without return, into property of value; to his services may be ascribed the value of the property; his lien for compensation is consistent with the principles of natural equity, and is favored by the law, which, in such cases, is construed liberally.² But this reasoning seems to have been departed from, and the rule remains in a somewhat unsettled condition.

For a considerable space of time, doubts were entertained as to whether a lien existed in favor of a trainer, for his services and cost of keeping a race-horse intrusted to him for training. In the earlier cases, some distinctions, in appearance more technical than meritorious, were indulged in, and it was questioned whether the trainer had such a lien, unless the horse was to be trained for some special race.

The difficulty in establishing the rule that a horse-breaker or trainer had, for his services, a lien on the animal, appears to have occurred in considering the question of what peculiar value the trainer had imparted to the animal.

¹ 2 Kent's Com. 588; Story on Bailments, 437; Jones on Bailments, 88, 89, 119, 120.

² Scarfe v. Morgan, 4 M. & W. 268. "The artificer, to whom goods are delivered, for the purpose of being worked up into form; or the farrier, by whose skill the animal is cured of a disease; or the horse-breaker, by whose skill he is rendered manageable, have liens on the chattels in respect of their charges; all such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases."

The proposition was conceded to be correct, that the bailee, who, by his labor or skill, renders especially valuable the chattel confided to him for that purpose, has upon the chattel a lien for his pay; but it was thought that the horse-breaker or trainer who received a horse to break or train, generally, and without special reference to some race for which he was to prepare the animal, did not receive him for a purpose sufficiently definite to give him the benefit of the rule, while, if he receive the animal to fit for a certain race, his services have a definite end, and the rule applied.¹

The later English cases, while they recognize the proposition that the lien-holder may lose his lien by parting with the possession of the animal, declare the general law to be in accordance with the views given in *Bevan v. Waters*, namely, that the care and skill employed by a trainer upon a race-horse are of such a nature as would, on general principles, give a right of lien; that, according to the general principles of lien, and independently of contract or usage, which may qualify any particular case, a trainer of race-horses employs that sort of skill and labor which would entitle him to a lien, because he

¹ In *Jackson v. Cummins*, 5 M. & W. 342, the true issue was as to a lien claimed by an agistor of cows, but the Court, (by Parke, B.) in the decision, and by way of illustration, says: "The general rule is that, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." Further, in the same opinion, occurs this language: "As to the case of a training-groom, it is not necessary to say anything, as it has not been formally decided; for, in *Jacobs v. Latour*, 5 Bing. 130, the point was left undetermined. It is true, there is a *nisi prius* decision of Best, C. J., in *Bevan v. Waters*, that the trainer would have a lien, on the ground of his having expended labor and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the judge, nor was the usage to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right, during the continuance of the process, to take the animal away for the purpose of running races for plates, elsewhere.

"The right of lien, therefore, must be subservient to this general right, which over-rides it; so that I doubt if that doctrine would apply where the animal was a race-horse." "I doubt if it extends to the case of a race-horse, unless, perhaps, he was delivered to the groom to be trained for the purpose of running a specified race."

In the case at *nisi prius*, *Bevan v. Waters*, mentioned above, it was held, on the principles of the common law, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge; that the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races.

educates an untaught animal and otherwise adapts it to a particular purpose, and thereby greatly increases its value.¹

The Courts of the United States, while they do not appear to have had occasion to make application of the principle involved to the matter of the rights of trainers of horses, concur with the English authorities in the general proposition that a lien belongs, in general, to every bailee for hire whose services have contributed to enhance the value of the property placed in his hands.²

A continuing right of possession of the animal is requisite to completely invest the trainer with the character of a lienholder, and whether there is such a right of possession in any case depends on the nature of the particular contract or the custom which is applicable to the subject-matter. Where it appears that the owner of the animal has a present right to the possession of it, as if he has the right to send a jockey to take from the trainer the horse to run in a race—if he may, at pleasure, employ him in any way, by giving his use to another, or taking it himself—such a condition of things is inconsistent with a lien in favor of the trainer.³

§ 138. The owner of a stallion has a lien on the mare.

—The owner of a stallion also is entitled to a specific lien on the mare; the principle involved is as in the case of the trainer, who adds to the value of the animal; the veterinary surgeon, by

¹ *Forth v. Simpson*, 13 Q. B. Adol. & Ellis, N. S. 682-4.

² *Pinney v. Wells*, 10 Conn. 106, 115; *Hutchings v. Oliver*, 4 Verm. 549, 551; *Stoddart M. Co. v. Huntley*, 8 N. H. 441; *Hogden v. Waldron*, 9 Id. 66; *Moore v. Hitchcock*, 4 Wend. 292; *Mount v. Williams*. In *Grinnell v. Cook*, 3 Hill's N.Y. 491, the cases of *Jackson v. Cummings*, and *Scarfe v. Morgan*, 4 M. & W. 270, are approved of: it is declared to be a general rule that every bailee for hire, whose labors have imparted additional value to chattels, has a specific lien.

³ *Forth v. Simpson*, 13 Adol. & Ellis, 684; *Rogers v. Grothe*, 58 Penn. 414; 2 Kent's Com. 887; *Cardinal v. Edwards*, 5 Nevada, 36. In Nevada, a special statute gives to agistors, stable-keepers, and others a lien on, and right to detain until the bill is paid, animals left with them to pasture or feed. A stable-keeper took a team of six work-horses to board—the team was used in hauling wood; the owner, after using them one day, as usual, failed to return them to the stable; the stable-keeper claimed a lien on them for his feed-bill. It was held that, though he might, under the statute, have retained them in his possession, and insisted on his lien, yet, having allowed them to be driven away, he relinquished possession, and thereby lost his lien. "A voluntary relinquishment or surrender of possession always destroys the lien."

whose skill it is cured of a disease; these have liens on the animal in respect of their charges; such liens, being consistent with the principles of natural equity, are favored by the law, and the law is liberally construed in such cases.

This, then, being the principle involved, it is clear that the matter under consideration is within the rule. The object is that the mare may be made more valuable by being got with foal. She is delivered to the "stander of the stallion," that, by the use of his horse, she may be made so. If the horse be known by his owner to be vicious, and by his vice the mare be injured, or should it occur that, through want of peculiar care or lack of skill on the part of him who "stands" the stallion, an injury to the mare occurs, the bailee is responsible. And there is such a general resemblance in effect, in the results anticipated on both sides, between this business of keeping a stallion for hire and those other occupations above mentioned, in which a lien for remuneration exists, that it results, reasoning by analogy, that there must be such a lien in favor of the owner of the stallion.¹

§ 139. Veterinary surgeons have much the same responsibilities and advantages in the business of their vocation as do

¹ Hanover on the Law of Horse, 213; Oliphant's Law of Horses, 240; Scarfe v. Morgan, 4 Mees. & Wels. 283. This case was trover for a mare which had been sent, on more than one occasion, to the premises of defendant, who was a farmer, to be covered by a stallion belonging to him, and the charge of eleven shillings, for the last occasion, not having been paid, the defendant refused, on demand, to deliver up the mare, claiming a lien for the eleven shillings.

It was held that the defendant, to whom belonged the stallion, was entitled to retain the mare, and had a specific lien on her for the charge of covering.

The Court (per Parke, B.) says: "The case is new in its circumstances, but must be governed by those principles which are to be collected from other cases in our books. The principle seems to be well laid down in *Bevan v. Waters*, that, where a bailee has expended his labor and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. This, then, being the principle, let us see whether this case falls within it; and we think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant, that she, by his skill and labor, and the use of his stallion for that object, be made so; and we think, therefore, that is a case which falls within the principle of those cited in argument."

trainers of horses. They occupy a *quasi*-professional position in the community, and, in England, are educated to its duties.

The Royal College of Veterinary Surgeons was founded in 1791, and regularly incorporated in 1845. By its charter, veterinary surgery is constituted a profession, and the registered members of its body are alone to be recognized as members of that profession, diplomas being granted, upon due examination, after an appropriate educational course.

One who holds himself out to the public as a veterinary surgeon, and publicly offers his services in that behalf, thus taking upon himself a public employment, is, in the line of his business, bound to serve the public as far as his employment goes, or an action lies against him for refusing.¹

§ 140. Malpractice against veterinary surgeons.—The veterinary surgeon may render himself liable for malpractice; the value of the health or life of the subjects he is called upon to treat may be less than that of the surgeon or physician who deals with the ailments of human beings, but, to the relative extent of the dignity and importance of their positions in the body politic, their several responsibilities are alike.

Where a person holds himself out as being skilled in a certain line of business, as one competent to care for sick or injured animals, and he is called upon for the performance of services in that line of business, the law implies a contract on his part; not that he will certainly effect a cure, but that he can, and will, use all known and reasonable means to accomplish that object; that he will attend the animal carefully and diligently, and will employ, in its treatment, such reasonable skill and diligence as are ordinarily exercised in his vocation by persons

¹ *Hanover on Horse*, 214; *Lane v. Cotton*, 1 Salk. 18. This is an old English case, which seems to have become, by common consent, the leading authority in the premises, although, on examination, it presents but little to entitle it to the prominence to which it has attained. It is an action against a postmaster for loss resulting from a letter having been feloniously abstracted. In the opinion occurs this sentence: "Also, when a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. Thus, if a farrier refuses to shoe a horse, an innkeeper to receive a guest, a carrier to carry, when they may do it, an action lies; their undertaking is in proportion to their power and convenience." (*Hare v. Reese*, 7 Phil. 138; *Carpenter v. Blake*, 60 Barb. 488.)

made competent in that behalf by experience and study. For a breach of this contract he is liable in damages to such an extent as may result therefrom; the measure of damage is, generally, to be ascertained by the jury; on the issue of lack of skill, in case the person, who claims to have suffered therefrom, has the affirmative, and no presumption of the absence of proper skill and attention arises from the mere fact that a cure is not effected.¹

The right to be paid for his services—unless an express contract is made to that effect—does not depend on the successful treatment of the case by the horse-doctor; and, on the other hand, in an action for damages for malpractice, it would not avail the veterinary surgeon to show that he has not asked any pay for his services; he is liable to the injured party for damage caused by want of due care and skill in performing services which he gratuitously promises to do, when it appears that the other party relied upon the promise to the extent of believing that the services will be rendered in a skillful and proper manner.²

The veterinary surgeon cannot, properly, allow another to act in his place in the care of the animal intrusted to him; the owner of the horse may well be supposed to rely upon him, his reputed learning, and skill; he might, if he could not command the services of the man of his choice, prefer some other to the person to whom the one he had charged with the business had confided it, and it would appear that the doctor, who should thus delegate the performance of his duties to another, might neither be able to collect his recompense nor avoid responsibility.

§ 141. The veterinary surgeon has a lien.—A lien exists in favor of the veterinary surgeon for his fees and expenses in

¹ *Hare v. Reese*, 7 Phil. (Pa.) 138; *Hesse v. Kippel*, 1 Mich. (N. P.) 109; *Carpenter v. Blake*, 60 Barb. (N. Y.) 488.

² *Gill v. Middleton*, 105 Mass. 477; *Baird v. Gillett*, 47 N. Y. 186; *Conner v. Winton*, 8 Ind. 315. This was an action against Winton by Conner, for malpractice as a veterinary surgeon; the jury were instructed that "if W pretended to no skill as a farrier, or was not known to C as such, but as a matter of friendship, or otherwise, recommended the operation, and it was assented to by C, and was performed accordingly, W is not liable, even though the horse died in consequence of it." Held, that W was a mandatory, and responsible

keeping the horse, and he may detain the animal until his proper charges are paid; he occupies a position, in the premises, similar to that of the trainer or horse-breaker, and the statements of the legal principles involved, hereinbefore made, are equally applicable to the person who, by his skill, saves the health, usefulness, or life of the animal, as they are to the owner of the stallion, or the breaker or trainer of horses; by the skill and care of the veterinary surgeon, strictly speaking, the value or usefulness of the chattel is not created, but it is preserved, and restored when it would otherwise be lost.¹ Like others, who have such liens, the surgeon must guard his possession of the

as such for gross ignorance or gross negligence, and hence the instruction was erroneous.

¹ *Rodgers v. Grothe*, 58 Penn. 414. This was an action of replevin for a horse; the plaintiff delivered the horse, when it became sick, to one Beam, to cure, under an agreement to pay \$10, and \$1 per month for pasture, and other feed at cost; plaintiff found the horse in possession of defendant, who showed, on the trial, that Beam took the horse from plaintiff under this agreement, kept him a month, could not cure him, notified plaintiff of that fact, and desired him to pay charges, as per contract, and take the horse away; that plaintiff did not comply with this demand, but left the horse a long time with Beam; that B continued to treat and care for the horse, through this period of several months, and again notified plaintiff to pay charges and take his horse; that plaintiff did offer to pay Beam a sum less than was due, and take the horse, but B did not accede to the offer, and having been unable to get his pay from plaintiff, and having given notice to plaintiff that unless payment of his just charges was made he would sell the horse, Beam afterward did sell the same to defendant for full value. Upon these facts, the Court held that a lien existed in favor of the successor in interest of the bailee, and rendered final judgment in favor of defendant; but as this case measurably turns on the construction of a local statute, the deduction of general principles from the decision requires a consideration of the opinion, which is as follows: "At the common-law, the lien of a bailee for service lasts only while he retains the possession. His relation to the bailor, the owner of the chattel, is a personal one, and grows out of the confidence the bailor is presumed to repose in the skill and fidelity of his bailee, when intrusting his property to him, for the service intended to be performed upon or toward it. The law implies a contract, on the part of the bailee, to perform the service skillfully, and then return the chattel faithfully, on payment of his service. Hence, if he sell, or pawn it away, he is guilty of a breach of his fidelity to the bailor, and at once forfeits his right of lien. The authorities cited by the defendant in error clearly show this to be the law, and, so far, the learned judge (who acted in the Court below as *nisi prius*) would have been justified in his rulings. But when the Act of 14th December, 1863, (Purdon, by Brightly, 1344) gave to the bailee the power to sell the property at auction, in order to enforce his lien, it introduced a change in the relation of the parties which relieved the bailee from the duty that required constant possession as the means of enforcing his lien. The property in his hands then became a security for his claim, with the means of enforcing payment. The property was thus capable of transfer to any one who would bid for it in the due course of procedure, and of conversion

horse, as his lien depends on that, under the common-law rule that the lien of a bailee for service only lasts while he retains possession.

§ 142. **Farriers** occupy, toward the owner of animals sent to them to be shod, substantially the same relation, as to duties, responsibilities, and advantages, as do horse-trainers and veterinary surgeons; they may not, unreasonably, refuse to shoe a horse, because, where a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing.¹

His remuneration is a matter of contract, and where there is

into money. The relation between the parties was thus changed in its most important and peculiar feature. But in this case the bailee did not pursue the act of assembly, by making a public sale, after due notice to the owner to come and take away his horse, and pay the charge upon him. The sale, it is very certain, did not carry the title, and left the defendant, who was the purchaser, unprotected against the demand of the plaintiff, as the owner of the horse, in an action of replevin; and this brings us to the only substantial question in the cause. The defendant claimed the benefit of the lien of the bailee, and the right to retain the horse until payment of the bailee's charges, and for this purpose offered to prove that after the bailee gave notice to the plaintiff to pay his charges, and after waiting the sixty days required by the act, the bailee 'transferred the horse, *with all his claims upon him*, to the defendant, for full value.' This offer the Court rejected, on the ground of irrelevancy. Though right under the common-law, we think the Court erred in view of the change in the relation wrought by the statute. The property in the hands of the bailee being now a security for the payment, with the means of procuring satisfaction by a sale and conversion, the reason of the common-law rule has ceased. There seems to be now no good reason why a transfer of the debt or charge for the property, together with the possession of the property, should not effect a substitution of the purchaser to the right of the bailee to receive the money, and to retain the security until payment, where the sale and transfer have been bona fide, and there has been no fraud or abuse of the owner's property. As the owner of the charge, the purchaser is capable of giving the owner of the property a sufficient receipt or acquittance for the debt, and has in equity the same right to proceed regularly to demand payment, and to enforce it by a sale in due course of law, after notice, as the bailee had originally. The rights of the owner of the property remain unchanged. He is bound only for the charge as it existed in the bailee, and can demand and receive his property from the purchaser precisely on the terms he could do if his property yet remained in the bailee's hands. In the absence of fraud or removal of the property out of reach, or any other act of abuse of the original relation of bailment, there seems to be no equity in permitting him to recover without doing equity by paying or tendering the charge, which is a lien on the property. We are of opinion that the Court below erred in ruling out the defendant's offers. These remarks sufficiently indicate the principles upon which the case should be retried."

¹ Lane v. Cotton, 1 Salk. 18.

no special agreement, he must go upon a *quantum meruit*; the local usage as to price is the general measure of his compensation, as, from the constant demand for his service, a custom as to charge becomes unavoidable, and the contracting parties are presumed to know the custom.

The farrier, in taking a horse to shoe, by implication, under the law, contracts to do the work in a proper manner, is bound to possess and exercise the requisite degree of skill and care, so to do; and if he prick a horse, or otherwise injure him in shoeing, an action lies against him to recover the damage done, unless the farrier is able to show that the accident occurred through no lack of skill or care on his part, or that of his employee, in doing the work.¹

¹ 2 Chitty's Plead. 262; *Rex v. Kilderly*, 1 Saund. 312, N. 2; *Everard v. Hopkins*, 2 Bolster, 332; *Longmead v. Holliday*, 6 Ex. 764; *Collins v. Rodway*, an unreported case before Chief Baron Pollock, at Nisi Prius, 1845.

In this case, an action was brought against a farrier for unskillfulness in the shoeing of two horses, sent by the plaintiff to be shod at defendant's forge, which he carried on for the purpose of shoeing horses with a shoe for which he had a patent. The one, a gray mare pony, was sent on the 16th of July, in the evening, after working hours, and was shod at the particular request of plaintiff's father. On the 17th, she was driven, with two men in a gig, to Barnett, and, it was admitted, for three miles went well. On the 20th the shoes were taken off by the apprentice of Beck, another farrier. On the 21st, the defendant received notice of her lameness, and, on the 26th, after her feet had been cut about and poulticed, she was reshod by Beck, and afterward worked. It appeared that subsequently she had been turned out for nine weeks. The other horse, a black pony, was sent to be shod on the 18th of July. On the 21st, the shoes were taken off by Beck, and blood was said to have followed the withdrawing of two of the nails. It was admitted that this pony's feet were very thin and bad, and his action very high. What was done to this pony did not appear, but he had been under the care of a veterinary surgeon, and was finally sold for a small price. The defendant's case rested on two grounds: First—That even if the ponies were lamed by him in shoeing, he was not liable, because he had brought to the performance of that duty competent skill and reasonable care. Secondly—That the lameness of the other resulted from causes other than defendant's shoeing.

In summing up, Chief Baron Pollock said to the jury: "The only rule of law that I feel it necessary to lay down upon the subject in this case is, that if this operation has been performed unskillfully and improperly, the defendant is liable to the plaintiff for any mischief that may have resulted from such unskillfulness, but he is liable only to the extent to which mischief has been produced. The rule I take to be this: that a person employed for any purpose must bring to the subject-matter a reasonable skill and fitness, and he must exercise that reasonable skill and fitness with due and proper care. If he be deficient in the requisite skillfulness, and, in consequence of that, the operation is performed in a bad or bungling manner, or if, having the requisite skillfulness, he fails to bring it to act, he is liable for any mischief which results from that." (14 Veterinarian, 102.)

If a horse be injured, in shoeing, by the negligence of the farrier's servant, or by reason of his want of skill, the master is liable, because the employer, the proprietor of the farrier's shop, in holding himself out to the public to do work of the special character indicated, at his place of business, induces the owner of the animal to bring him there to be shod, and is the cause of the horse being intrusted to the careless or unskilled workman.¹

But if the wrong be willful, as if the servant maliciously drove a nail into the horse's foot in order to lame him, the master would not be liable; he is bound to see that his workmen possess the requisite skill; this he has means of ascertaining, and so, with safety, placing himself in a position wherein he guarantees his abilities, but he cannot guard against malice, or actions instigated by motives of which he can have no knowledge, and for these, therefore, he should not be called to answer.²

§ 143. The farrier has a lien for his charges in shoeing upon the animal left with him for that purpose; this lien, like that of trainers, the owner of the stallion which has served a mare, the veterinary surgeon who has saved or restored to health a sick or injured horse, results from the general principle above enunciated, that where chattels are intrusted to one of a special trade, calling, or pursuit, to be by him worked upon in such manner as to develop or preserve its natural usefulness, or to increase, by his labor and skill, the especial value of the property, the person who does the work should and may look to the chattel upon which he has operated for his remuneration, rather than be forced to trust to the honesty or pecuniary ability of his employer.

Hence, it results that where, from the nature of his employment in a specified calling, such as a horse-shoer at a forge in a public place, a person is obliged, at reasonable times, to hold himself subject to the demands of such as require his services therein, the person who does the work may retain the chattel until his charges, they being fair, are paid.³

¹ 1 Bl. Com. 431; *Randleson v. Murray*, 8 A. & E. 109.

² *Jones v. Hart*, 2 Salk. 440.

³ *Lane v. Cotton*, Ante; *Bacon's Abr. Trover*, (E) 816, in which it is said that trover does not lie against a farrier for refusing to deliver a horse which he has shod, unless the money for shoeing has been paid or tendered.

The animal can only thus be kept for work done at the time when the lien is claimed. The lien cannot be claimed for a former bill or previous account, even for shoeing the same horse.

The rule, as we have already seen, is that if the person who claims the lien permits the animal to return to its owner, if he parts with the possession, he loses his lien ; and hence it results that, his lien as to the previous charges having lost its vitality, it cannot be revived by a new employment.¹

Scarfe v. Morgan, 4 M. & W. 280; *Chase v. Westmore*, 5 M. & S. 189. "Because the artificer to whom goods are delivered for the purpose of being worked into form, the farrier by whose skill an animal is cured of a disease, the horse-breaker by whose skill a horse is rendered manageable, and the man who covers a mare with a stallion, have liens on the chattels in respect of their charges."

¹ *Rashforth v. Hadfield*, 7 East, 229; *Oliphant's Law of Horses*, p. 237. "But the horse can only be kept for work done at that particular time, for the lien does not extend to any previous account; and when this point was decided by the Court of Queen's Bench, Lord Ellenborough said: 'Growing liens are always to be looked at with jealousy, as they are encroachments on the common law.'"

CHAPTER XII.

CATTLE.

- § 144. Special laws for protection of cattle from disease.
- § 145. Effect of statutes for protection of cattle from contagion.
- § 146. Sale of cattle affected by contagious disease.
- § 147. Laws to prevent importation of diseased cattle.
- § 148. Marks and brands.
- § 149. Drovers of cattle, their rights and duties.
- § 150. Right to graze cattle on open commons.

§ 144. Special statutes for the protection of cattle from disease have, at various times, been deemed requisite by the Congress of the United States. "An Act to prevent the spread of foreign diseases among the cattle of the United States," was duly passed December 18th, 1865, providing, in terms, "that the importation of cattle be and hereby is prohibited." Section 2 of the act continues in force the foregoing provision until proclamation given by the President, for thirty days, shall declare that "no further danger is to be apprehended from the spread of foreign infections or contagious diseases among cattle."¹

Another act, passed March 6th, 1866, forbids the importation into the United States, from any foreign country, any live cattle, or hides of dead cattle, until the Secretary of the Treasury or President shall give public notice or proclamation that no danger from such importation of infection exists.²

In New Hampshire, provision by statute is also made, to the effect that whenever any dangerous or troublesome disease prevails among cattle, the governor may appoint a board of five commissioners to make due examination in the premises, and prohibit the introduction into, or transportation through, the State of cattle affected by infectious diseases.³

¹ U. S. Statutes at Large, Vol. 14, p. 1.

² Stats. of New Hampshire, 1867-71, p. 524.

³ Ibid, pp. 3-4.

By the statute law of Iowa, under the title of "An Act to prevent the importation of Texas or Southern cattle, and the spread of the so-called Texas or Spanish fever among the cattle of Iowa," it is provided that it shall not be lawful for any one to bring into that State, or to have in his possession within the said State, any Texas, Cherokee, or Indian cattle, except such as, at the time of the passage of the act, were in the State, and those must be so guarded as to prevent any disease being spread by them.¹

In several of the other States, there are similar statutes, of a *quasi*-police character, for the prevention of the introduction of cattle affected by diseases of an infectious character. In some, it is allowed to kill any animal so diseased as to become a source of danger, to other cattle; and in other States, as in Missouri, he who has diseased or distempered animals must so restrain them as to guard against spreading the ailments to which cattle are liable, and especially that commonly known as Texas or Spanish fever, and in other States, as, for example, Massachusetts, the disease "pleuro-pneumonia" among cattle.²

§ 145. Effect of laws for protection of animals from contagion.—The general scope and tenor of these statutes for the protection of cattle is not alone by the appointment of boards of examiners, with plenary powers in the premises, to extirpate disease by the destruction of diseased animals, and

¹ Laws of Iowa, 1861 to 1868, p. 272.

² Missouri Stats. by Wagenar, Vol. 1, p. 135; Ibid, 251; Stats. at Large of Minnesota, Bissell, Vol. 2, 1873, p. 1102; Compiled Laws of Michigan, Vol. 1, 1871, p. 569; Supplement to Stats. of Massachusetts, 1860-66, p. 34; Ibid, p. 41; Ibid, p. 43; Ibid, p. 78; Ibid, p. 123; Genl. Stats. of Kentucky, 1873, p. 178; Ibid, 348; Genl. Stats. of Kansas, 1868, p. 1013; Ibid, 1872, p. 387; Ibid, 1873, p. 262; Revised Stats. of Maine, 1871, p. 221. "The municipal officers of towns, in case of the existence of the disease called long murrain, or pleuro-pneumonia, or any other contagious disease, shall cause the cattle in their towns infected, or which have been exposed to infection, to be secured or collected in some suitable place or places therein, and kept isolated; and, when taken from the possession of their owners, one-fifth of the expense thereof is to be paid by the town, and four-fifths at the expense of the State, such isolation to continue so long as the existence of such disease or other circumstances may render it necessary; or they may direct the owners thereof to isolate such cattle upon their own premises, and any damage or loss sustained thereby shall be paid as aforesaid." (Genl. Stats. of New York, 1867-70, p. 434; Ibid, 105; Genl. Laws of Oregon, 1845-64, p. 644; Genl. Laws of Ohio, 1868, p. 11; Laws of Pennsylvania, 1700-1870;

by imposing penalties upon the introduction of cattle affected by contagious distempers, or by stringent regulations to the same end, but, as in the language of the Kentucky statutes, "the owner of any distempered cattle who shall permit them to run at large outside of his inclosure, or shall drive them into or through any part of this commonwealth, (Kentucky) unless it be from one part of his inclosure to another, shall forfeit and pay the sum of ten dollars for each head; and when such cattle shall die, the owner thereof shall cause them to be buried; and if he fail, he shall be fined five dollars for each offense."¹ From these stringent rules imposed by *special legislation*, it would naturally be supposed that the *general law* would impose correspondingly severe restrictions, but such is not wholly the case.

Keeping cattle which are affected by an infectious disease is not, of itself, an act of culpable negligence. The owner cannot be held responsible for the communication of the disease to other animals, unless it appear that there was some fault on his part other than the mere keeping of the animals on his premises; nor does the fact that his neighbor keeps, to his knowledge, healthy animals in his field adjoining, alter the case.² The

Purdon's Dig. by Brightly, Sec. 1417; Genl. Stats. of Rhode Island, 1872, p. 178; Genl. Stats. of Vermont, 1870, p. 670, Sec. 27; Stats of Wis. Taylor, 1871, p. 800. Secs. 4, 5, and 6; Code of W. Virginia, 1868, p. 240, Sec. 44.)

¹ Statutes of Kentucky, 1873, p. 178.

² Shearman & Redfield on Negligence, Sec. 133; Fisher v. Clark, 41 Barb. (N. Y.) 320. This action was brought by the plaintiff, to recover damages upon the following facts: The parties were farmers owning adjoining farms; each had a flock of sheep; those of the defendant had a contagious disease called the *scab*, and the facts of the disease and its character were known to defendant; the defendant sent word to plaintiff that he intended to turn his flock of diseased sheep into the field adjoining that wherein plaintiff had his healthy flock; against this plaintiff remonstrated, and defendant promised to forego his said intention, but did not keep to this agreement, but returned to his original intention, and, without notice to plaintiff, turned into his field, adjoining plaintiff's pasture lot, wherein were his healthy sheep, the diseased sheep; the fences were not "sheep tight"; the lambs and some of the sheep from the affected flock got among plaintiff's sheep, and, as the natural result, the healthy flock of plaintiff became diseased, and largely damaged in their market value.

On appeal, the decision was adverse to the right of recovery.

By the Court, E. Darwin Smith, J.: It is well settled that every man has the absolute right to use his own property as he pleases, for all the purposes to which such property is usually applied, without being answerable for the consequences, provided he exercises proper care and skill to prevent any unnecessary injury to others. (4 Coms. 202.) This right to use his property as he pleases is unlimited and unqualified, up to the point where the particular use becomes

a nuisance. (22 Barb. 297; *Picard v. Collins*, 23 Id. 444.) The complaint in this action, before the justice, stated that the defendant, while the plaintiff was occupying adjoining land to his for the pasturage of a flock of sheep, turned into his lot, adjoining, a flock of sheep which he knew had a contagious disease, known as the scab, by reason of which the plaintiff's sheep took the disease, and he sustained damage. The gravamen of the complaint is, that the defendant, knowing that the plaintiff had a flock of sheep running in his lot, turned his own sheep, having the scab, a contagious disease, into an adjoining field on his own farm. There is no allegation of negligence, carelessness, or of a malicious intent to injure the plaintiff.

The justice must have held, upon the complaint, that this act of the defendant gave to the plaintiff a right of action to recover to the extent of the injury sustained; that is to say, he must have held, and that is the claim, that simply turning his own sheep, having an infectious disease, into his own lot adjoining a lot of the plaintiff's, occupied with sheep, was unlawful, or such an act of wrong or negligence as gave to the plaintiff a legal cause of action for any injury sustained.

To maintain an action there must be a legal injury, an invasion of some positive, certain, legal right. It could be no violation of the plaintiff's rights for the defendant to occupy his own land in his own way, unless he created a nuisance thereon. Pasturing sheep having an infectious disease was not a nuisance. It was and could be no injury to the plaintiff unless he suffered his sheep to take the contagion by permitting them to come in contact with the defendant's sheep. Each party had a right to use his own field to pasture his sheep. If the defendant's sheep had infectious disease, infectious only to sheep, he had the same right to have the same in his own field as the plaintiff had to permit his sheep to run in the adjoining field, exposed to take such disease. A person sick with a contagious disease is not obliged to abandon his own house to prevent the spread of such disease. A house occupied by persons having an infectious disease is not a nuisance. (2 Barb. 104.) It is not pretended that the disease of the defendant's sheep was a nuisance. They did not render the enjoyment of life or property uncomfortable, (*Fish v. Dodge*, 4 Denio, 311) or endanger the health of the neighborhood. (9 Paige, 575; 3 Barb. 157.) Nor were they offensive to the senses, like a slaughter-house, or gas-works, or swine-sties, or lime-kiln, or a livery-stable, or a tannery. (17 Barb. 654; 22 Id. 312.) There is no basis to sustain the action on the ground of negligence; for the defendant invaded no legal right of the plaintiff. The principle of the maxim *sic utere tuo*, etc., will not sustain the action, according to the decision of the Court of Appeals, in the case of *The Auburn and Cato Plank Road v. Douglass*, 5 Seld. 449, where it is held that this principle only applies when one owns a tenement which is subject to the servitude of another tenement, or has an easement in another's land, or some fixed legal right or interest therein. The same case also decides that an action will not lie, in such case, on the ground that the defendant acted maliciously. The evidence in the case would, perhaps, have furnished some ground to raise such a question of fact, although the right of action in the complaint was not based upon any such grounds. But the case last cited holds that when the defendant has no legal right or interest in the plaintiff's premises, or easement, or claim thereto, it is immaterial what may be the motives of the proprietor for dealing with his property in any particular way. The same principle was asserted in *Mahan v. Brown*, 13 Wend. 261, and in *The Newburgh Turnpike Co. v. Miller*, 5 John. Ch. R. 101.

In *Franz v. Hilterbrand*, 45 Missouri, 122, plaintiff owned and worked on his place horses which appeared to have the glanders; the neighbors, for safety to their animals, themselves, and families, shot the diseased horses, and the action

keeping of diseased animals on a person's own ground by him who owns the land, is not such an act of negligence as would render him liable in damages to the owner of other animals, which, being healthy, come upon the premises, and from the diseased cattle take the malady, even where it is no trespass for the healthy animals to come, if the owner of the animals which are healthy is duly warned of the danger.¹

§ 146. Sale of cattle affected by contagious disease.—

If one sells diseased cattle, fraudulently representing them to be free from infectious disease, when, in truth, they are so diseased, or if one sells such as are so affected and fraudulently conceals from the buyer the fact of their being so unhealthy and dangerous, he is held to a strict accountability.

If property is sold for a particular purpose, or to be used in an especial manner, and the vendor is aware of that fact, he must be deemed, in making fraudulent representations, to have

was against them for damages for so doing. The Court held that "in so doing they acted from a sincere but mistaken belief that they had the right to enter the plaintiff's premises and abate what they deemed to be a nuisance and source of danger; they acted from good, but mistaken and unjustifiable motives," and defendants were held liable in *compensatory* but not in *exemplary* damages.

But in *Mills v. N. Y. & H. R. R. Co.* 2 Robertson's Reports, 326, it was held that, conceding the right to use one's own premises as a hospital for diseased horses, a person must not turn such out on the highway, permit them to drink at a public trough, or otherwise jeopardize his neighbors' animals; that the owner of animals, which he is aware have a contagious disease, must exercise all the care that a prudent man naturally would, or a rightful regard for the interests of others requires, such as placing his diseased animals so remote from a partition between his stable and that of his neighbor as to render contact with his neighbor's animals impossible.

¹ By *Walker v. Herron*, 22 Texas, 55, it appears that the keeping of diseased animals on an open pasture which belonged to him, but to which animals which belonged to other persons also came and habitually grazed upon, by defendant's tacit consent, was not actionable; that plaintiff, whose stock took, from defendant's animals, the disease, could not recover damages therefor, inasmuch as defendant had warned him of the danger.

But in *Barnum v. Van Dusen*, 16 Conn., which was an action for trespass for the entry of diseased animals, it was held, and such appears to be the rule, that in trespass for diseased cattle damage from infection may be stated in aggravation.

In this case, defendant's sheep, which were diseased, broke into plaintiff's close, and carried to his sheep the malady, which was infectious; many of plaintiff's sheep died from the disease, and he was held entitled to recover, as damages on *trespass quare clausum frigit*, the loss suffered in his flock; and also, it was held that the defendant's knowledge of the disease might properly be considered by the jury in estimating damages.

accepted the consequences which might reasonably be regarded as likely to result therefrom; so, in selling cattle, the seller may know, or in reason be supposed to assume, that a farmer, drover, or other purchaser would probably put the animal with others of a like kind in his possession, and incur the risk of losing them all. If this occur, that the plague spreads from the diseased cow, the vendor, who, either by fraudulent declarations or silence, induced the purchase, ought to stand the loss.¹

¹ "The English Court of Common Pleas Division, in *Smith v. Green*, 33 L. T. (N. S.) 572, held, in an action for breach of warranty, the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the warranty. In the case under consideration, the plaintiff, a farmer, bought a cow from the defendant, warranted free from foot and mouth disease. The cow had the disease, and communicated it to plaintiff's other cows, with which she was placed. In an action for breach of warranty, the judge below told the jury if the defendant knew, or ought to have known, that plaintiff, in the ordinary course, would put the cow with other cows, they might give damages for the loss of the other cows; and the Court on appeal held this to be a right direction." (Chicago Legal News, Jan. 22d, 1876.)

Mullett v. Mason, (L. Repts.) 1, Common Pleas, 559. In this case, the defendant had a cow which had been imported into England from parts beyond the seas, and was suffering from a disease which was infectious; he induced plaintiff to buy the cow by falsely representing to him that the cow had been raised on his father's farm in the neighborhood, by concealing from him the fact that the animal was diseased, and informing him that it was free from disease.

The plaintiff, relying upon these representations, paid a fair price for and took the cow to his premises, and placed it with his other stock. In a short time it became manifest that the cow had the plague, and had infected with that disease five other cows belonging to plaintiff before it was discovered by plaintiff that his stock was in danger; these five other cows died, and the one bought became worthless.

Plaintiff was held entitled to recover the value of the five which died, as well as that which he had bought, on the ground that "in an action for fraudulent misrepresentation, the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations."

In *Jeffries v. Bigelow*, 13 Wend. 518, in a case of fraud, where an agent, authorized to sell a flock of sheep, sold a portion of them with knowledge that they were diseased, and the diseased sheep were mixed with another flock, it was held that the claim of the purchaser against the principal was not limited to the loss of the sheep purchased, but extended to that of the others to which the distemper was communicated; and the Court said: "This damage was the natural consequence of the fraudulent act of the defendant's agent."

See, also, *Knowles v. Nemus*, 14 L. T. (N. S.) Q. B. 592, and *Farris v. Lewis*, 2 B. Monroe, 375; *Sedgwick on Damages*, 59, 100, 149. In *Packard v. Slack*, 32 Vermont, 9, it was held that it was not necessary to the recovery of the special damages to show that the vendor knew that the diseased animal was to be placed with others belonging to the plaintiff.

Winty v. Morrison, 17 Texas, was a case where a man sold a drove of horses, which he knew to be infected with a contagious disease, and concealed the fact

§ 147. Laws to prevent importation of diseased animals.—The prohibition of the bringing of animals affected by diseases which are infectious, is not an infringement of the right of the citizen to acquire, use, and dispose of property; neither is it such an exercise of legislative power by a State as to interfere with the enumerated powers granted to Congress, “to regulate commerce with foreign nations among the several States, and with the Indian tribes.”¹ Such enactments come within the scope of the police powers of the State, and the constitutional questions are but little, if any, more involved than by the exercise of ordinary police powers, by which the liberty of the citizen is limited for the public good. Each State has the unquestioned right to pass all laws necessary for the restraint and punishment of crime, the preservation of the public peace, and the health and morals of its citizens. By virtue of this power, the importation and sale of cards, dice, and billiard-tables have been prohibited; the traffic in spirituous liquors regulated and suppressed; the vending of lottery tickets, the sale of unwholesome food or drink, and the making or manufacturing of poisonous candies, are made penal offenses.

So, under due exercise of the police power, property may be destroyed in time of conflagration, nuisances may be abated,

that they were diseased from the buyer, who bought for a sound price; the vendee, in exercising his right to rescind the contract, was held entitled to recover the money paid, with interest, and the value of his care, expenses, and attention in preserving the herd. If he should elect not to rescind, he would be entitled to damages equivalent to the value of such as had died and the difference between the value, at that time, of the surviving horses and the price paid for them, with interest on these sums from the date of sale; also the value of his care, time, and expense in preserving the herd. The buyer's damages are not, in such cases, confined to those actually diseased at the time, but the disease is regarded as infecting the whole herd, to the extent proved up to the time of trial. The latter is liable also for the damages sustained by the buyer to the extent of the contagion communicated to other animals of the buyer without his default.

¹ *Yeazel v. Alexander*, 58 Ill. 254; *Lenndville v. Marks*, *Ibid.*, 371; *Davis v. Walker*, 60 Ill. 452; *Newkirk v. Milk*, *Ibid.*, 172; *City of St. Louis v. McCoy*, 18 Mo. 238; *Same v. Boffinger*, 19 Mo. 13; *R. R. Co. v. Fuller*, 17 Wall. 560; *License Tax Cases*, 5 Wall. 462; *Slaughter-House Cases*, 16 Wall. 62; *Gibbon v. Ogden*, 9 Wheat. 1.

R. R. Co. v. Gossaway, Supreme Court of Ill. Jan. 16th, 1875. The act for the prevention of “Texas” or “Cherokee” cattle being brought into Illinois held constitutional.

“A common carrier is not bound to receive for transportation that which the law prohibits it from carrying, and it must be held, in this respect, to act at its peril.” (*Ibid.*)

goods from a neighborhood where an infectious disease is prevailing may be prohibited from being brought into the State, and every species of infectious property, everything manifestly injurious to the public health or morals, may be prohibited or removed. Even the importation of gunpowder, not on account of any qualities of taint, but because of its explosive character, may be prevented. All such legislation would be a direct interference with trade, yet the power has never been questioned. It results from the law of self-preservation, which is inherent in every community. It is a right which pertains to the State exclusively; its exercise must be prompt, and, strictly speaking, occasional. From its nature it would not naturally have been parted with to the General Government, and it could not have been delegated. The State is under the same obligation, and has the same power, to protect the property of the citizen from disease and death, as to preserve its morals and health. A State powerless to do so would have none of the attributes of sovereignty, would be bereft of all merit to respect, and could retain no hold upon the citizen by affording him protection from danger.¹

§ 148. Marks and brands, put by the owners thereof upon their cattle to distinguish them from those belonging to other persons, are, in many of the States, so far a recognized institution as to call for special legislation to surround the system with such guards by providing for the record of the distinctive marks and brands, by acts for the punishment of crime in those who shall kill cattle distinguished by special marks or brands with-

¹ "The police power is one of self-preservation, to be exercised by the State, in its sound discretion, for the interest and safety of its citizens. The necessity of the law is one of legislative determination. The character of the remedy in such case, when one is necessary, must be settled by the legislature. Whether the importation of the cattle should be permitted on conditions, or whether wholly prevented, were matters peculiarly within the province of the law-making power. There was danger to be apprehended to the property of citizens of the State; disease lurked upon her borders. Shall we inquire whether she acted wisely or justly? Shall we supervise the legislature, and substitute our discretion in place of the discretion exercised by the legislature? This we cannot do without touching upon the rights of a co-ordinate department of the State government. We are, therefore, of opinion that the legislature had the right, by virtue of the police power, to enact the law in question." (*Yeazel v. Alexander*, 58 Ill. 254; *Somerville v. Marks*, *Ibid*, 371; *Davis v. Walker*, 60 Ill. 542; *Newkirk v. Milk*, *Ibid*, 172; *City v. McCoy*, 13 Mo. 238.)

out preserving evidence thereof, and by divers other appropriate provisions, making the system of thus marking cattle a distinguishing element in all transactions affecting changes of ownership of them in such manner as to guard cattle from theft, which might otherwise be comparatively safe to the perpetrator.

Generally, the owner of stock who has adopted a distinctive mark or brand for his cattle, is required to record the same in the local records, and, when he makes sales, to "vent" or counterbrand by reversing the mark on the animals disposed of; thus the purchaser is put upon his guard. The first mark indicates the adoption of it; the "vent," or counterbrand, shows that from the original owner, at all events, the transfer of property has been regular and valid.

Proper penalties to carry out the provisions and purpose of these acts are imposed to prevent infringements upon, and duly to enforce them as a part of, the respective criminal codes of the States in which they are in vogue.¹

The alteration of marks or brands on cattle, fraudulently, for purposes of theft or other improper interference with the owner's possession of them, is also made a criminal offense, and dealt with, to some extent, in the summary manner by which, as a rule, the stealing of stock has been punished in the United States.

§ 149. Drovers of cattle who, for hire, undertake to receive animals at one point to be driven by them to another, as from the farm of the owner to market, are bound to use the same care in regard to the cattle intrusted to them which men of ordinary prudence would exercise over their property under the same circumstances. The farmer, ordinarily, would be un-

¹ Revised Code of Ala. (1867) p. 317; Comp. Laws of Ariz. p. 79, Sec. 65, and p. 589; Acts of Ariz. (1873) p. 92; Rev. Stats. of Col. p. 450; Political Code of Cal. Secs. 3167, 3172, 3184, 3185; Thompson's Dig. (Fla.) pp. 419, 492; Code of Ga. (1873) pp. 243, 795, 829; Laws of Idaho, p. 111; Nixon's Dig. N. J. 4th Ed. 16, Sec. 11; Genl. Stats. N. H. 220, Secs. 16, 17; Comp. Laws of Nev. Vol. 2, 460; Stats. of Nev. 1873, 99; Laws of Montana, 1871-2, 284, Sec. 78; Wagner's Mo. Stats. Vol. 2, 926; Stats. at Large of Minn. Vol. 1, 234, Sec. 84, 1002, Sec. 118; Rev. Stats. of Maine, 1871, 353, 627; Genl. Stats. of Kans. 1868, 1012; Laws of Iowa, Rev. of 1860, 259, 752; Stats. of Ind. Vol. 1, 532; Stats. of Ill. Vol. 1, 178, 436, 262, 263; Id. Vol. 2, 259; Stats. of Tenn. 1871, Vol. 1, 803, 804; Laws of Texas, 2d Ed. 467, 468, 781, 782; Stats of Wis. (1872) 73; Laws of Wyoming, 2d Ses. 90; Id. 1869, 426, 427.

able, profitably, to drive stock which he has raised any considerable distance to a place of sale, and would not desire to sell them—unaware as he often is of their sale value—at his farm. Hence, the employment of a class of bailees for hire, known as drovers, has become a custom. Both parties are benefited by the bailment, and, while extraordinary diligence and care are not by the law imposed on the bailee, as he would be held to were he alone benefited, he will be liable if he fails to use such care as a prudent man would exercise over his own property under similar circumstances, and by reason of such neglect the cattle are lost.¹

¹ *Maynard v. Buck*, 100 Mass. 40. The defendant was a drover engaged in driving cattle from Brighton to various points between that place and Worcester. Plaintiff intrusted to him a pair of steers to drive from Brighton to Northborough for a stipulated price. On the way, the steers were lost or stolen, and the evidence left it uncertain whether the steers were in defendant's drove when he started, or were stolen from his yard, at Brighton, before he started. The defendant showed that he left his yard with a drove of one hundred and twenty-three cattle; that he had, to help him drive, two men and a boy; that about dusk, at a point where the road was near a railroad, a train of cars passing by frightened and stampeded the drove into the adjoining fields; that, as soon as possible, he got them back into the road, and drove on to the stopping-place for the night; in the morning, nine animals, including plaintiff's steers, were found to be missing; that he proceeded with his drove, delivering cattle along the road, until he arrived at the end of his route at Worcester, two days after his departure from Brighton, and on the evening of the second day after the discovery of the loss. Early on the morning of the next day—which was two days after he became aware that the cattle were missing—he returned to seek them, but was unable to find the steers.

Plaintiff claimed that defendant ought to have gone at once, on discovery of the loss, to hunt the missing stock; but defendant showed that, to have done so, he must have detained the whole drove, at a great expense of feeding, and that the custom among drovers engaged in driving cattle for hire over this road, and others from Brighton, whenever it happened that a small number of cattle strayed from a drove and could not be found immediately, to proceed with the band to their destination, and then return and seek for such stray cattle. The admissibility of evidence showing these facts was questioned; but the Court, in holding it competent and relevant, said: "This must be determined with regard to all the circumstances of the case. Among these circumstances are the difficulty of pursuing a search while the drove in his charge was in mid-route, and the expense of maintaining the drove during the necessary or probable delay. The usual practice or mode of proceeding ordinarily adopted by drovers, under like circumstances, when engaged upon routes of no greater length from the same point, would have some bearing upon the question of what is ordinary care. It is involved in the comparison indicated by the term *ordinary*."

The plaintiff further contended that defendant was negligent in leaving his yard unwatched; in not having more help to guard the stock from danger on the road; in approaching the railroad when a train was about to pass; in not counting the cattle when he left Brighton to start on the trip; in not again

counting them after the stampede ; and in not sending back word, and causing the cattle to be advertised and searched for as soon as the loss was discovered.

Instructions covering the views of the respective parties were requested and given, or refused, in accordance with the opinion of the Court in which the cause was tried. A verdict for plaintiff was the result, and, on appeal therefrom, the opinion of the Court, which sustained the judgment, was: "The instruction that the defendant was bound to use the same care in regard to the cattle, which he undertook to drive for hire, that men of ordinary prudence would exercise over their own property under the same circumstances," was correct, and in accordance with numerous authorities. (*Cayzer v. Taylor*, 10 Gray, 274; *Shaw v. Boston & Worcester R. R. Co.* 8 Gray, 45; *Shrewsbury v. Smith*, 12 Cush. 177; *Sullivan v. Scripture*, 3 Allen, 564; *Giblin v. McMullen*, Law Rep. 2 P. C. 317.) The degree of care to be required of one who is intrusted with the property of another, for reward, is not less than that which is to be expected of one who deals with his own property. If the first instruction asked for is based upon a recognition of such an obligation, it is only equivalent to that which was given by the Court. But if the comparison with those "engaged in driving cattle for hire" was intended to indicate that one who drives for hire is bound to a less degree of care, "because he is a hireling, and careth not" for his charge, it asked for a rule which has never been recognized either as good law or good morals. The evidence as to the usual practice or mode of proceeding ordinarily adopted by drovers was held at the previous hearing to be admissible upon the question of ordinary care, because it tended to show what had been found, by the experience of others, to be most judicious or expedient in like emergencies, not because they were drovers for hire, as distinguished from owners driving their own cattle.

The defendant further insisted that the jury should be instructed that, "if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action." But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. The usual practice is made up of particular instances of conduct, by the limited number of individuals similarly engaged, within the knowledge of the witnesses who may be called to testify. That which is admissible in evidence is, not the particulars, but what the witnesses state, from their own knowledge of those particulars, to be usual, or the course ordinarily pursued. The character for prudence, of those whose conduct or acts go to make up this usual practice, is not required to be shown. It forms no part of the inquiry. The effect and purpose of the inquiry is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which the jury are to determine whether the conduct in question in the case before them was proper and justifiable. We think the instruction asked for, in this particular, was not such as should have been given.

The instruction asked for, to the effect that "the defendant was not obliged to make any outlay disproportionate to the compensation he received, to recover cattle that had strayed from the drove without his negligence," and, therefore, that the price he received was "to be taken into account" upon the question of

As to what is such care must be ascertained by a fair consideration of the circumstances in each case. Ordinary care must be measured by the character and exposures of the business, and the degree required is higher where a large amount of property is involved than in other cases. For hire, the bailee covenants to do for his employer what, otherwise, he would do for himself—to represent him in the matter; and, while he might not be expected to entertain the same degree of feeling of interest in the animals which he would who had raised them, or to whom they belong, he should be impressed with such care and responsibility as is commensurate with the value of the stock.

§ 150. The right to graze cattle upon open commons is not of so absolute a character as in all cases to exempt the owner of them from risk of such accidents as are incident to the circumstances.¹

Thus, where the statutes do not compel railroad companies to fence, it would be unjust to put upon them the whole burden of losses which are liable to occur by injury to animals straying upon the track. Both the company and owner of the animals are in the proper exercise of their calling, and are equal in the eye of the law; to impose upon one party the cost of making

due diligence, was inadmissible. The price is undoubtedly graduated by the well known risks of the business, and accepted in view of those risks. The obligation to seek the recovery of straying cattle does not rest upon the ground that that special service is paid for in consideration of the original contract, and, as such, is covered by its consideration. When an emergency occurs to bring that obligation into operation, and make it onerous, he is not justified in any lack of faithful performance, because, in that particular event, his compensation has proved inadequate to the burden.

¹ *Isbell v. N. Y. & N. H. R. Co.* 27 Conn. 393; *Daly v. R. R. Co.* 26 Conn. 591; *Brown v. Lynn*, 31 Penn. St. 510; *R. R. Co. v. Terry*, 8 Ohio St. 570; *R. R. Co. v. Matthews*, 21 Ohio St. 586.

There appears, upon an examination of the cases, a liability to criticism in the subject of trespass, being a disregarder, and in treating the matter as though the animal were rightfully in the place where the injury occurred, thereby making the whole question one merely of negligence, and considering the former of no moment, unless it may have some effect in supporting the existence of the latter, or they turn upon some point which avoids due consideration of the proposition, that while the company may owe special duty to those through whose lands their road runs, they are not, in all cases, similarly bound to all who allow their animals to run at large. See opinion of Hall, J. in *Keefe v. R. R. Co.* Jan. Term, 1875, Sup. Ct. Minn.

Knight v. Albert, 6 Barr, 472; *R. R. Co. v. Hunnewell*, 8 Wright, 378.

good the damage done would be to render the ownership of property such as railroads especially annoying and hazardous—would be discriminating and partial.¹

¹ In *Caulkins v. Matthews*, 5 Kansas, 191, the plaintiff allowed his horse to go at large. The horse wandered on the uninclosed land of the defendant, and fell into an old well, which caused its death. The Court below charged the jury that "the defendant was liable, if negligent." Judgment was reversed, on the ground that the defendant, at most, could only be held liable for gross negligence.

In *Railway Co. v. Rollins*, 5 Kansas, 167, the plaintiff allowed his cattle to graze upon the open, uninclosed prairie, near the defendant's track—the land on both sides of which belonged to the defendant—and they strayed upon the track and were killed by the train. The Court says: "Ordinarily, when a person allows his cattle to run on another's land, without the owner's consent, the owner of the land is not liable for any injury to the cattle received whilst there, unless the injuries are caused through his gross negligence. But when any person knowingly allows his cattle to run on the land of a railroad company, in the vicinity of a railroad track, he can recover for injuries done to the cattle only through the most gross and wanton negligence of the railroad company."

There is, possibly, some little confusion of the terms in the last two cases, but we are to understand by gross negligence such a degree of willful negligence as would lead, in the law, to the implication of willfulness, or wantonness. (*Kesfe v. Railway Co. Sup. Court Minn. Jan. Term, 1875.*)

CHAPTER XIII.

LAWS RELATING TO SHEEP.

- § 151. Laws for protection of sheep from dogs.
- § 152. Measure of damage done to sheep by dogs.
- § 153. Ignorance of vicious habits of dogs no defense.
- § 154. Liability of owners where several dogs attack sheep.
- § 155. Soundness of sheep; infectious diseases.
- § 156. Protection of sheep from infectious diseases.
- § 157. Duty of shepherd and agistor of sheep.
- § 158. Sheep taken on shares.
- § 159. Rights of owner and bailee of sheep.
- § 160. Wool, peculiar duties of vendor of.

§ 151. Laws for protection of sheep from dogs.—By the statutes of many of the States, sheep are especially guarded from the ravages of their natural enemies, dogs. That sheep may be thus protected, it is made lawful to destroy dogs which are found killing or worrying them. The persons who kill the dogs are held free from suit or prosecution for so doing, and the owner of the offending dog is held answerable, not only for what damage has really been done, but often for a larger amount, by way of a preventive against harboring such dogs as manifest a disposition to injure sheep.

In some of the States, the protection of sheep is made a matter of *quasi*-police regulation; the county authorities, by proper licenses, restrict the keeping of dogs to such persons as, having animals of that description which they deem of enough value to induce them to answer for their acts, will hold themselves in readiness to respond, in damages, for the misdeeds of their dogs in worrying or killing sheep.¹

¹ In Alabama, any person who keeps a dog which has been known to kill or worry sheep, is liable to him who owns sheep, for double the amount of damage done to the sheep by his dogs; any person may kill the dog so found worrying or killing sheep, and cannot be punished or made civilly liable for doing so; and if any person keeps or harbors, and allows to run at large, a dog which has

by him been known to kill or worry sheep, he is guilty of a misdemeanor, and liable to be fined therefor not more than fifty dollars. (Revised Code of Alabama, 1867, p. 320; Stats. of Alabama, 1872-3, p. 131.)

The Statutes of California were, in effect, similar to those of Alabama, until the enactment of the codes, 1872.

The appropriate code (Political) does not, in express terms, or by fair implication, continue in force these provisions for the protection of sheep, and no new enactment takes their place. (Stats. Cal. 1870, p. 223; *Ibid*, 1866, 225; Political Code, Secs. 18, 19.)

In Connecticut, when a person has suffered damage by dogs worrying or killing his sheep, he gives notice to the selectmen of the town in which the damage has been done, and the selectmen bring suit for him against the owner or harbinger of the offending dog; and unless the damage is made good by this suit, the town becomes liable to the owner of the sheep for such damage. To make provision for such liabilities all dogs are licensed, and the revenue from these licenses is held as a fund from which to meet this class of liabilities. (Stats. of Conn. Rev. 1866, p. 668; Stats. of Conn. 1866, p. 109.)

In Georgia, by special statute, the owners of dogs which worry or kill sheep are made liable for such damage. (Code of Georgia, 1873, Sec. 2965.)

By the laws of Idaho and Minnesota, any person may kill a dog which is found worrying, wounding, or killing sheep, and no prosecution or action of any kind lies against him for the dog. (Laws of Idaho, 4th Session, p. 104; 5th Session, p. 165; Stats. at Large of Minn. p. 593.)

In New Hampshire and New Jersey, the towns are liable, under a system much like that in vogue in Connecticut, and a tax, by license upon dogs, is imposed to meet such liabilities; the owner or harbinger of the dog which has caused the damage may be sued by the town authorities for the injuries suffered from the ravages of his dog, or of one which he permits to remain upon his premises. (Nixon's Digest of Laws of New Jersey, 1709-1868, pp. 16-23; Gen. Stats. of N. H. pp. 219, 220.)

In New Castle County, Delaware, it is lawful to kill dogs addicted to worrying sheep, and a list of all dogs within the county is kept; all dogs are to be either licensed or destroyed, and from the results derived by licensing dogs the county authorities make good the damages suffered by sheep being wounded or killed by dogs. (Laws of Del. 12, pp. 252-254, 282; 13, pp. 135-138.)

In Georgia, the owner or harbinger of a dog which causes damage by worrying or killing sheep must pay for all such damage. (Code of Georgia, 1873, Sec. 2914.)

By the statute of Minnesota (Bissell, 1873, Vol. 1, 593) it is provided that any person may, without incurring liability, civil or criminal, kill a dog found fretting, injuring, or killing lambs, or sheep; and he who owns or has in his possession any dog which kills, wounds, or worries sheep or lambs "shall be liable for the value of such sheep or lambs to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him that his dog was mischievous, or disposed to kill sheep."

In Michigan, any person may, without rendering himself liable either criminally or by civil action, kill a dog that he may see chasing, worrying, wounding, or killing any sheep, lambs, swine, cattle, or other domestic animals, out of the inclosure or immediate care of the owner or keeper of the sheep, etc.

The owner or keeper of a dog which assaults, bites, or otherwise injures sheep, is liable in double damages therefor to him who owns the sheep, and it is not essential to the recovery that it be shown that he to whom the dog belonged, or who harbored him, knew of his propensity to do such damage or mischief; but plaintiff cannot recover more than five dollars costs. If the owner or keeper of a dog which has been chasing, worrying, wounding, or killing sheep, lambs,

swine, or cattle, which belong to another person, he must kill the dog after having received notice, in writing, of his having done said acts, and in default of his so killing him, or causing him to be killed, the owner or harbinger of the dog is liable to be fined three dollars, and a further continuing fine of one dollar and a half for each forty-eight hours which the dog shall live after the lapse of the first two days after said notice is given; and upon notice given to the supervisor of any township that such an offense has been committed by any dog, the supervisor may, and it is his duty to, bring the action last above mentioned for and in behalf of the township. (Compiled laws of Michigan, 1871, pp. 671, 672.)

In Massachusetts, all dogs are registered, numbered, and described annually; a license tax is imposed and collected, and a tag or marked collar, showing such number, must be kept on the dog.

Dogs not licensed are to be killed by the town or city authorities.

Any person who suffers damage by his sheep being injured by dogs, on giving notice and making due proof to the local authorities, from them receives his compensation, unless he prefer to bring his action directly against the owner of the dog, in which case he may do so. (Supplement to Rev. Stats. of Mass. 1867-71, pp. 545-8.)

In Maryland, by the general statutes, (Codo of 1860, p. 595) it is provided that the owner of sheep shall give notice to him who has a dog which has been seen to worry sheep, and thereupon it becomes the duty of him to whom the dog belongs to kill him; if he fail to do so, the person whose sheep have been injured may kill the dog, and recover double damages from him who has failed to kill the dog which belongs to him, and has so offended.

In New Hampshire, each town has a license system by which the registry of all dogs therein is kept, and a special fund is raised to pay damages suffered by the owners of sheep by the depredations of dogs, and the owner of the dog is moreover liable in double the amount of damage which has been done by his dog in worrying sheep. (General Stats. of New Hampshire, p. 218.)

By the act for the preservation of sheep in New Jersey, passed April 14th, 1847, every person who keeps a dog six months is taxed therefor, and on being notified that his dog has been found worrying sheep, he must kill him within twenty-four hours; or failing to do so, forfeit ten dollars and costs of suit, and pay treble damages. (Nixon's Digest, 4th Edition, p. 14.) But in 1869, it was provided, "that the protection afforded by this act to owners of sheep, shall only extend to residents or tax-payers in the township" where the damage was done. (Laws of 1869, p. 97.)

In New York, any person may kill a dog found worrying sheep; in each of the counties, except that of New York, all dogs are taxed, and the money resulting from these taxes is kept as a fund to satisfy damages done by dogs to sheep; moreover, the fence-viewers of each town are made a special board of examiners to establish the amount of damage done by any dog to sheep; the owner or the harbinger of the dog is made liable to an action by the owner of the sheep for damages, and the report of the board of town fence-viewers is made primary evidence of the facts and amount of damage done. (New York Statutes at Large, 2d Ed. Vol. 1, p. 655.)

By the Revised Statutes of Ohio, (Swan & Critchfield, Vol. 1, p. 71) any person may destroy a dog found worrying sheep.

In Oregon, similar statutes permit the killing of dogs found worrying sheep, and make the person who owns the dog liable for the damage done by his dog. (General Laws of Oregon, [Deady] p. 678.)

Laws similar in effect prevail in Pennsylvania; dogs may be killed by any person who finds them injuring sheep, and the owner of the dog is liable for the damage done by his dog to sheep. (Laws of Pennsylvania, [Dunlop] p. 251.)

§ 152. Measure of damage done to sheep by dogs.—

The amount of damage done to sheep by dogs is sometimes ascertained, and paid by the town officers acting for the public under special statutes, some of which—notably that of New Hampshire—are peculiarly severe in dealing with the owner of the dog for damages done by it to sheep.

The injured party first seeks redress at the hands of the selectmen of the town; and, upon making proof of the nature and extent of his loss, the town authorities pay it; and afterward the town, in an action of assumpsit against the keeper or owner of any dog concerned in doing the damage or occasioning the loss, may recover the full amount paid to him who owned the sheep.

This system has been found to be faulty, in that the main facts of the controversy, the amount and character of the damage done, are established without the party who is ultimately liable having been heard at all.

The *ex parte* determination of the selectmen is by the act made conclusive on the owner or keeper of the dog, as to the amount of the damage done, and consequently as to the extent of his liability.

Taxes are laid upon dogs, and the revenue thence derived is appropriated to pay damages done to sheep by dogs. (*Laws of Pennsylvania*, 1873, pp. 454, 489, 648; *Laws of 1872*, pp. 240, 286, 415, 671, 826, 1105.)

The several townships of the various counties are, by distinct acts, made subject to provisions in effect as above detailed; but, from the large number of statutory enactments in the premises, it is not possible here specifically to refer to each one.

In Rhode Island, the law is such that, for the first time a dog worries sheep, the owner may recover damages therefor from him who harbors or owns the dog; if, after such first offense, the dog still lives and injures sheep, his owner is liable for double damage, and the Court wherein the action for damages is tried may order the dog to be killed. (*Revised Statutes of Rhode Island*, p. 206.) By a subsequent statute, (1872, pp. 200, 203) a provision is made for the licensing of dogs, and appropriation of the funds resulting therefrom to payment of damages to sheep done by dogs.

The law of Tennessee permits any person to kill a dog which injures sheep, and makes the owner of the dog liable for damages done by the dog. (*Statutes of Tennessee*, Vol. 1, Sec. 1861.)

By the code of West Virginia, (1868, p. 240) a special tax is laid upon dogs, and the money realized therefrom is appropriated to paying for the damage done to sheep by dogs; and any person who harbors a dog known to be addicted to the habit of worrying sheep, is deemed guilty of a misdemeanor, and liable to be punished therefor by fine of not less than twenty dollars.

This characteristic affects, to a greater or less extent, all those statutes by which the town authorities are made primarily liable, and it is, to say the least, questionable how far such statutes are constitutional and capable of being enforced.¹

§ 153. Ignorance by owner of propensity of his dog to worry sheep.—No scienter is necessarily to be alleged or proved in actions brought to recover damages caused by dogs injuring sheep; the farmer, or other person who keeps a dog, does so on the terms of paying for the damage he may cause by worrying sheep; there is, by the law, imposed on him who harbors a dog, a contract to answer for his misdeeds; all persons are presumed to know the law, and, by implication, he who keeps a dog agrees to respond in damages for his wrongful acts.²

Knowledge, on the part of the owner of a dog, of the fact

¹ In *East Kingston v. Towle*, 48 N. H. 57, this proposition was discussed, and the constitutionality of the act was one of the main issues.

The defendant owned a dog, and the sheep were killed. The person to whom the sheep belonged made his showing of the amount of damage, received payment therefor, and thereupon the Board of Selectmen brought *their* action against the owner of the dog alleged to have been concerned in killing the sheep. The defendant demurred, on the ground that the statute was unconstitutional.

The Court sustained the demurrer, and held that the law, so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional, because it is contrary to natural justice, and not within the scope of legislative authority; and also because it is in violation of the provision in the bill of rights which secures the right of trial by jury in all controversies concerning property, except in cases where it had heretofore been otherwise used and practiced.

But it was also held that the legislatures have the power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs; but the action must be tried by the mode of procedure of other damage cases. The defendant is entitled to have heard upon the trial all of his defenses; to show, if he can, that it was not his dog which did the harm, and to rebut the showing of the one who owned the sheep of the amount of damage done.

² The common-law rule is not as given in the text; by the English law, the owner of a dog is liable for mischief done by him, if he had notice of the animal's vicious propensities; but in America, this liability is so generally enlarged by statute, that, practically, the common-law rule is set aside, and a man keeps a dog at his peril, against the natural propensity which dogs have to destroy sheep. (*Woolf v. Chalker*, 31 Conn. 121; *Fish v. Scutt*, 21 Barb. 333; *Job v. Harlan*, 13 Ohio St. 485; *Kerr v. O'Connor*, 63 Penn. St. 341; *Sedgwick on Measure of Damages*, Sec. 570; *Campbell v. Brown*, 1 Grant [Pa.] Cases, 82; *Brewer v. Crosby*, 11 Gray, 29; *Pressy v. Wirth*, 3 Allen, 191; *Smith v. Montgomery*, 52 Me. 178; *Orne v. Roberts*, 51 N. H. 510.)

that the dog has a vicious disposition, or that he would worry sheep, need not, as a general rule, be proved in America, in order to charge the owner with the damage done by his dog; although the rule in England still appears to be that there such knowledge must be charged and proved before he to whom the dog belongs can be made liable.¹

§ 154. Several dogs attacking sheep, liability of owners.—When two or more dogs make the assault together and do the damage jointly, the liability of the several owners of the dogs becomes a question likely to arise.

From the majority of the decisions the rule is to be deduced, that where several dogs, belonging to different owners, unite in doing mischief, an action against all the owners jointly does not lie; but each person is liable for the damage done by his own animal.²

In ascertaining just what damage was done by each, the jury will regard all the facts and circumstances shown; but in the

¹ So held by Lord Coleridge, C. J., and Keating, J., in *Applebee v. Percy*, Law Rep. 9 C. P. 647. Brett, J., dissenting, not to the main proposition, but to the application of the rule to the case at bar.

² *Russel v. Tomlinson & Hawkins*, 2 Conn. 206. The action was damages for twenty-eight sheep, killed by the two dogs which belonged to the defendants. The defendants did not own the dogs jointly: one defendant owned one dog, the other defendant owned the other dog. The Court, at *nisi prius*, instructed the jury that if they should find that the plaintiff's sheep were worried and killed by the dogs, they must find both the defendants guilty, and award damages against them and in plaintiff's favor; a verdict for plaintiff was the result, and defendants appealed, assigning this instruction as misdirection. The Supreme Court reversed the judgment, and held that "two or more persons owning dogs, severally, are not jointly liable for acts of mischief done by such dogs jointly."

In the opinion, Swift, C. J., says: "Owners are responsible for the mischief done by their dogs; but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining in mischief, could make their owners jointly liable. This would be giving them a power of agency which no animal was ever supposed to possess.

"It is true that there may be some difficulty in ascertaining, in separate actions, the quantum of damage done by the dog of each; but this can be no reason why one man should be accountable for mischief done by the dog of another."

Van Steenburgh v. Tobias, 17 Wend. 562; *Auchmuty v. Horn*, 1 Denio, 495. In this case it was also held that the farmer, whose hired man had a dog which followed him about, could not be held liable for the damage done by his man's dog. (*Denny v. Cowell*, 9 Ind. 72; *Partenheimer v. Van Orden*, 20 Barb. [N. Y.] 479.)

absence of any proof as to how much damage was done by each of several dogs implicated in the attack, the presumption is that one did as much damage as another;¹ but, to rebut this presumption, the jury may regard the respective size, ferocity, and known habits in the matter of killing sheep, of each.²

The converse of the general rule above given is in a late case (1869) held to be the law, by the Supreme Court of Pennsylvania.

In this decision, the learned judge (Thompson, C. J.) who delivers the opinion says that "all the owners of several dogs, which, together, at one and the same time, kill and wound a flock of sheep, are all answerable for the damage"; that "each one is answerable for the whole damage done in which his dog is jointly engaged."³

But this case is at variance with what appears to have become the settled rule, is moreover a construction of the law of but one State, and the weight of authority, as above mentioned, is opposed to the reasoning therein.

§ 155. Soundness of sheep—Infectious diseases.—The diseases to which sheep are liable have caused judicial investigations and decisions as to warranty, sale, and covenants as to soundness, the controlling principles of which have been given in the chapters on sale, warranty, and soundness.

Such of the diseases to which sheep are liable as are infectious, demand, however, special notice, because of the possibility that, by the sale of animals which are affected by diseases of that character, the vendor may become liable in heavy damages.

The general rule of the measure of damages is, that he who is injured, in his action against him who has caused the injury, is entitled to such damages as necessarily and naturally flow from the act complained of.⁴

¹ *Partenheimer v. Van Orden*, 20 Barb. 479.

² *Wilbur v. Hubbard*, 35 Barb. 303.

³ *Kerr v. O'Connor*, 63 Penn. Stats. 341.

⁴ "If sheep are sold, with a warranty that they have entirely recovered from a disease they previously had, or that they would recover from the same, and such warranty is broken, the purchaser, when sued upon the note given for the price, if he has kept the sheep, will have the right to have his damages deducted

Applying this rule to the sale of sheep which are affected by a malady which is infectious, where the sheep which have the disease are to be mixed with others which are sound, the damage, if the flock become infected, is not the mere difference between the value of a diseased sheep and a healthy one, but the loss sustained by communicating the disease to the whole flock.¹

§ 156. Laws for protection of sheep from infectious diseases.—Where there are statutes providing that any person who suffers sheep owned by him, and known to be infected by contagious disease, to run at large, or who keeps them in any place where other sheep can have access to or be infected by them, shall be liable to pay all resulting damages, the statute cannot be evaded by confining the recovery to any one sheep which is first infected, and from which the disease has spread. It may, and ordinarily must, be the case, that the disease is first communicated to one, or a very small number, of the flock originally free from the disease, and thence spreads to the flock with which such sheep, which have taken the disease, habitually run. The general rule, that immediate or proximate damages are alone recoverable, is not applicable to the extent that the owner of the diseased flock is only responsible for the damage which can be shown from immediate contagion from his sheep. The object

from the amount of the note; and the measure of damages will be the difference in value at the time the warranty was broken, and what its value would have been had the warranty been true." (*McClure v. Williams*, 65 Ill. 390.)

¹ *Jeffrey v. Bigelow*, 13 Wend. 518. In this action, an agent of defendant sold to plaintiff a flock of sheep consisting of 500 ewes and seven bucks, which were mixed by plaintiff with a flock of 548 sheep which he before owned. Shortly after the sale, the disease called the "scab" made its appearance among the sheep bought as above related, and spread throughout the flock, so as to cause damage to the amount of \$1,525.

On the trial, it was proved that "scab" is a contagious disease, and that by putting a few sheep diseased with scab into a healthy flock the whole will become affected; that defendant bought sheep for the purpose of selling them again; that of the lot sold by defendant to plaintiff, there was a flock of 120 sheep which defendant had bought for a less price than the market value of sound sheep, because of the lot there were from 35 to 55 known to have the scab.

No information of the fact that the sheep were diseased was communicated by the vendor to the purchaser, and upon these facts the Court held the seller of the diseased sheep liable, not only for the loss of those sold which died, but also for the entire loss in the whole flock. (*Sedgwick on Measure of Damages*, Secs. 90, 91; *Bradley v. Rea*, 14 Allen, 20; *Mullett v. Mason*, Law Rep. 1 C. P. 559; *Knowles v. Nunn*, 14 L. T. [N. S.] Q. B. 592; *Faris v. Lewis*, 2 B. Monroe, 375.)

of the statutes is to afford protection to flocks of untainted sheep, by imposing extraordinary care upon those persons who have sheep which are affected by contagious disease; and such statutes are not to be defeated by any such hair-splitting refinements as would restrict the amount of damages to the injury done to individuals of the flock directly affected by contagion with the flock originally diseased.¹

As to the amount of care and skillfulness of treatment which the person whose flock has been injured by infection should exercise, it would appear that, it being made to appear that the sheep, otherwise free from disease, have been rendered ill and affected by disease by infection or contagion, it does not lie with him from whose flock the disease has spread to complain that he whose flock has been injured did not employ persons specially skilled to treat his sheep, or to take extraordinary means to seek remedies for them. If such a duty devolves on any one, it is upon the owner of the sheep from which the disease spread; he having caused the injury, is morally and legally bound to do all possible to repair it; the duty is upon him, and he cannot impose it upon a person guilty of no wrong.²

§ 157. Duty of shepherd and agistor of sheep.—The care of sheep, when they are in charge of a servant or bailee, should be such as their peculiar nature requires; and negligence in giving such care is a proper basis for an action of damages on the part of the owner, when he suffers from the lack of due attention being given to his sheep.

If the sheep are let out to pasture for a price, the bailment is for the benefit of both parties. In bailments of this kind, the bailor yields his present custody and care of the property to the bailee upon a contract implied by the law, by which he who

¹ *Herrick v. Gary*, 65 Ill. 104; *Mount v. Hunter*, 58 Ill. 246. "Under the Act of Feb. 16th, 1865, relating to diseased sheep, it is clear that the owner of sheep having contagious disease has no right to let them run, even upon his own land, where they can communicate disease to sheep lawfully pastured in an adjoining field." (*Ibid.*)

² "Where a plaintiff's sheep are infected from the sheep of defendant, the former will not be held responsible for more than ordinary care and skill in their treatment; but even if they could have been cured by proper care and treatment, this will not exonerate the defendant from the liability for the trouble and expense incurred by the plaintiff." (*Herrick v. Carey*, 65 Ill. 101-5; *Mount v. Hunter*, 58 Ill. 249.)

takes the animals on pasture agrees to exercise ordinary diligence in respect to the property bailed, and if any loss result from his failure so to do, he is liable for such loss.¹

§ 158. Sheep taken on shares.—The ownership of sheep “taken on shares” may become matter of controversy, from the peculiar property which each party to the contract has in the flock.

As a rule, the increase of animals belong to the person who owns the mother; but this rule becomes modified by circumstances, and such occur where sheep are taken to be pastured and cared for, in consideration, on his part who takes them, of becoming the owner of a part of the increase.

Until the division of the young is made, the parties are tenants in common as to them; but, so soon as to each is set apart his share, the interest of the other ceases, and the tenancy in common ends.

But the change of ownership, by which the bailee becomes part owner in the subject of the bailment, depends greatly upon

¹ Story on Bailments, Sec. 443; Ibid, Sec. 429; Jones on Bailments, 91, 92.

Phelps v. Parish, 39 Vermont, 511. In this action, the plaintiff sued for a pasturage bill of \$41.43. He had pastured for defendant certain cattle and sheep, and the amount claimed was the balance of the money due therefor. The defendant, as his defense, showed that plaintiff kept certain bucks, and so carelessly guarded them that they inopportunately got at defendant's ewes, and the consequence was that sixty of the ewes had lambs in the latter part of January, and “fifty-six of the lambs died, by reason of having so unseasonable a birth.”

The defendant, upon this showing, claimed that these facts constituted a breach, by the plaintiff, of the contract under which he kept the sheep and cattle, and that he, the defendant, should be permitted to recoup the damages resulting from such breach of the plaintiff's contract.

The Court sustained defendant upon this proposition, and said: “The parties having made no express contract as to the care and diligence which the plaintiff should exercise, the question arises, what obligations are imposed by law in this sort of bailment? It seems clear that the general principles of the law of bailment required the plaintiff to exercise the care and diligence, in respect to the property, which men of common prudence, under the circumstances, exercise about their own affairs. The exercise of this degree of diligence is not limited to the feeding of the animal, and the use of means to prevent it from straying, but the law requires its exercise by the bailee so far as shall be necessary to prevent such injury to the property as would be likely to result from ordinary negligence.”

Upon the question of recoupment, the language of the decision is: “The damages result from the breach of the very contract which the plaintiff seeks to enforce,” and the damages resulting from his breach of contract ought to affect his recovery under it.

the fulfillment of his part of the contract. There is a sort of conditional sale, by which he acquires no immediate interest, but may, at a future time, do so by compliance with the conditions stipulated. These conditions, where none are expressed in the contract, are implied by the law to be that he will exercise reasonable care—such as a prudent man would ordinarily do in protection of his own similar property—and he should be held to a fair showing of such care before any title vests in him.¹

§ 159. Rights of owner and bailee of sheep as to third parties.—For injuries to sheep let out on shares, it would seem that either the owner of the flock or he who has it on shares

¹ *Bradley v. Arnold*, 16 Vt. 382. This case was upon a written indenture, to the effect that plaintiff leased to one John Hunt certain lands and 500 sheep for the term of sixteen years, on condition that Hunt delivered to him, each year, one thousand pounds of the wool; and at the end of the term, this covenant having been complied with, Hunt was to become the owner of all the sheep and their increase.

The wool was duly delivered for five years; but on the sixth year, after the sheep were sheared, and the wool was in Hunt's possession, it was attached and sold under process on a judgment against Hunt.

This proceeding terminated the relation between the parties; and, upon the claim of the defendant of an interest in the flock, consisting of the original five hundred and their increase, the Court held that, "by the terms of the lease, the plaintiff must be considered the owner of the sheep until the expiration of the full term of the lease, and the performance of all the stipulations contained in it." (*West v. Bolton*, 4 Vt. 558; 2 Kent, 4th Ed. 498; *Barrett v. Pritchard*, 2 Pick. 512; *Dennis v. Belt*, 30 Cal. 247; *Rourke v. Bullens*, 8 Gray, 549.)

Robinson v. Haas, 40 Cal. 474. The plaintiff owned a large number of sheep, and contracted with one Rood to keep them for a certain length of time, upon the terms, that, at the end of that time, the original number of sheep should be made good to plaintiff out of the flock, and the increase, if any, divided between plaintiff and said Rood.

Rood took the sheep, and sold the flock to defendant, without informing plaintiff of his having done so. Plaintiff, upon being informed of what had been done, demanded of defendant the whole flock; which demand was refused by defendant, and thereupon plaintiff brought this action for the recovery of the sheep.

The Court held that the delivery of personal property to another, by the owner, to be taken care of and returned at a stated time, upon the terms that the latter is to be compensated out of its increase, is a mere bailment for the benefit of both parties, and does not divest the title of the true owner.

A contract between A and B, by which A transfers to B the possession of a flock of sheep, upon the terms that B should herd and take care of them for three years, at the end of which time he was to return to A the original number of sheep intrusted to him, and the increase be equally divided between them, does not form a partnership between A and B in the sheep.

may bring an action against a stranger: the bailee has a special property in the flock during the continuance of the contract, and he may protect that property by action from any tortious dispossession of it, or any injury to it. But, since the owner has also a general property, he also may maintain a like suit against the stranger.¹ But, in such a case, a recovery by either, it seems, will bar the action of the other.²

There is observable a distinction in this respect between a letting on shares and the case where the flock is hired out for a money rental for a specified term; in the latter case, the later decisions are to the effect that the owner cannot maintain an action against a third person for interference with the flock.

The owner of animals let to hire cannot maintain trespass against a stranger who interferes with them. To entitle a plaintiff to recover for injury to personal property, it must appear that he has such a right as to be entitled to reduce the goods to his possession when he pleases; and where the owner has parted with his possession for a term, during that term he loses control of it, has no right to its immediate possession, and therefore cannot maintain trespass for injury to the property.³

§ 160. Wool, peculiar duties of vendor of.—The sale of wool, from the peculiar manner in which it is packed, precluding very thorough examination by the buyer, has been a matter of judicial application of the general rules of sales of personal property, as to *caveat emptor*, warranty, and fraud. The real condition and character of the wool in the middle of the bale

¹ Croft v. Alison, 4 Barn. & Ald. 590; Sudden v. Leavitt, 9 Mass. 104; Hall v. Packard, 3 Campb. 187; Story on Bailments, Sec. 93; Nicolls v. Bastard, 2 Crompt. Mees. & Rosc. 659.

² Bac. Abr. Trespass, C; Ibid, Trover, C; 2 Black. Com. 396; Gordon v. Harper, 7 Term R. 9; Pain v. Whittaker, 1 R. & Mood. 99; Story on Bailments, 394.

³ Triscony v. Orr, 49 Cal. 612. "The demurrer to the complaint was properly sustained. Whether the action be deemed to be in the nature of trespass, trover, or trespass on the case, the complaint is defective in substance. The lease of the sheep constituted a bailment for hire, and during the term of the lease the lessee was entitled to the exclusive possession. The alleged trespass was committed during the term when the lessee was in the actual, and was entitled to the exclusive, possession as against the plaintiff, his lessor. It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for injury done to the property." (Putnam v. Wiley, 8 Johns. 432; Hoyt v. Gaston, 13 Ibid, 141, 561; Hurd v. West, 7 Cow. 752; Orser v. Storms, 9 Cow. 687.)

cannot be ascertained without laying the sacks open to the centers. This would result in great inconvenience to both parties, and would be almost impossible.

Hence, the person who packs the wool is held to a strict accountability in regard to his representations when he speaks of the wool, and his silence when possessed of information which he ought to disclose.¹

¹ Story's Eq. Jur. Sec. 212, citing with approval the following quotation from Hammond's Nisi Prius, 238, as correctly stating the rule of the English law as to defects entirely beyond the reach of the faculties of inspection: "If a vendor, having knowledge of a defect in the commodity, which cannot be obvious to the buyer, does not disclose it, or, if apparent, uses artifice and conceals it, he has been guilty of a fraudulent misrepresentation." The perfect silence may be the surest artifice. (2 Kent's Com. Sec. 482.)

Roseman v. Canovan, 43 Cal. 110, was an action to recover damages for a fraudulent misrepresentation as to the merchantable quality and condition of certain wool sold by defendants to plaintiffs; the vendor was the shearer, owner, and packer of the wool, which he offered and sold to plaintiffs. Some of the bales the buyers cut into about three or four inches, and made such examination as they could in that way, and by inspection of the outside of the bales; it appeared to be merchantable wool, dry, and looking well. There were some slight circumstances tending to show that the wool was wet, and the buyers mentioned them to the seller, but were by him assured that it was not wet, and he explained away the circumstances which had attracted the buyers' attention.

When the wool was opened, it was found very wet, full of mud, and not merchantable, because of its being in that condition; and on the trial it was shown that the sheep had been sheared in a wet, muddy corral; that the wool was "packed wet," and very muddy and dirty, "in a heating condition"; that the vendor knew these facts, but the buyers did not, and could not have ascertained them without opening the bales.

The Court held that though the rule of *caveat emptor* might apply, if the seller had remained silent, yet, under the circumstances, and on account of the active concealment and artifice of the seller, he was responsible in damages for a fraudulent misrepresentation.

That, unless there was warranty or fraud, the purchaser of chattels cannot be heard to complain of conditions or defects open to his observation, or which he might have seen had he thought fit to make an examination for that purpose. In such cases the maxims, "*caveat emptor*," and "*qui vult decepti, decipiat*," apply; but that these rules have no application to a case in which the vendor resorts to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, and which, but for such diversion, he might have followed.

CHAPTER XIV.

HOGS.

- § 161. Caveat emptor, in sale of hogs.
- § 162. Earnest-money in purchase of hogs.
- § 163. Sale of swine affected by contagious disease.
- § 164. Words of commendation not a warranty.
- § 165. Distinction between "hog" and "pork."
- § 166. The business of preparing pork for market.
- § 167. As to damage by hogs in trespassing.
- § 168. Killing hogs found "damage faisant."

§ 161. The rule, caveat emptor, in sale of hogs.—The sale of hogs is governed by the general rules and the law, as already stated, and enough of these general principles may be considered to have been given, were it not for the peculiar characteristics of the animal under consideration, and the application of the law necessarily to be considered with reference to those characteristics.

Where hogs are sold without an express warranty, and no fraud is shown, the purchaser takes the risk as to their quality and condition. If the buyer has an opportunity to examine, and does examine, the hogs before buying them, he must abide all losses which may result from their being diseased at the time of purchase, provided the seller makes no warranty, or is guilty of no fraudulent concealment of facts which render them worthless.¹

¹ *Eagan v. Call*, 34 Penn. St. 236; *Mason v. Chappell*, 15 Gratt. 572; *Fortune v. Singham*, 2 Campb. 416; *Jones v. Bright*, 5 Bing. 533; 1 *Smith's Leading Cases*, 182.

Frazier v. Harvey, 34 Conn. 471. This was an action to recover the price paid for a lot of hogs. Plaintiff examined them, agreed with the vendor as to the price, \$216, which was their market value, paid it, and took the hogs to his home. Shortly after the sale, it became apparent that the hogs were affected, and they all died from the disease within three or four weeks from the time of sale. Upon this showing, the plaintiff claimed a want of consideration, in having parted with his money for property which was of no value; but the Court did not regard the claim as well founded.

§ 162. Earnest-money in purchase of hogs.—Contracts are to be construed in view of surrounding circumstances, so that substantial effect may be given to the agreement upon which the minds of the parties have met; and although rules of a general character may be stated, the application of them must depend upon such contingencies as it is reasonable to consider that the parties have regarded as liable to occur.

Thus, in the sale of live stock, it is not unusual for sales to be made and earnest-money paid to secure the bargain; and where such earnest is manifestly intended to bind the trade,

The language of the decision upon this point is: "The rule of the common law is, that, where there is no express warranty, and no fraud in the sale of personal property, the purchaser takes the risk of its quality and condition. He must, therefore, suffer all losses arising from latent defects equally unknown to both parties.

"This rule, which, with us, was definitely settled by the case of *Dean v. Mason*, 4 Conn. 432, is too well understood as prevailing wherever the Courts profess to be governed by the principles of the common law, to require to be supported by the citation of authorities. But it is impossible to give full effect to this rule upon the idea that the charge in this case was correct. This charge was as follows: "If the defendant did not warrant the hogs to be sound, healthy, and free from disease, the plaintiff was not entitled to recover on the first count of his declaration; but that he was entitled to recover, upon the common counts, the price paid for the hogs, with interest from the time he bought them, if at the time he bought them they were so infected that they were of no value whatever, and that the plaintiff received no value whatever from his contract, and that there was a total failure of consideration; but that the failure of consideration was not total, if the hides or carcasses of the hogs were worth anything for any purpose whatever," "since it follows, as a necessary inference from the rule, that the total worthlessness of the article sold is as much at the risk of the purchaser as can be any partial defect which only impairs, to some extent, its value. In other words, the rule itself would be abrogated in all those cases where the defect in the quality is such as to render the article worthless. But the plaintiff cites, in support of a different doctrine, the general principles to be found in the text-books, that, where the consideration of a contract fails, the contract may be avoided; and if money has been paid for a consideration which has thus failed, it may be recovered back. But the difficulty in the plaintiff's case is, that there is no failure of consideration where the purchaser gets precisely what he agreed to purchase. Where the purchase is of chattels having a commercial value in the market, like live stock, it cannot be said of them that they are wholly sound, while the quality of them is unknown, or a secret disease by which they are affected is undeveloped. At the sale, the animals appeared to be free from disease, and sound. Presumptively, the fair market price for such animals was paid for them. They were then of value at the time of the purchase, and, as the purchaser takes the risk of the quality, where that is equally unknown to both parties, the secret defect which was afterward developed should have been guarded against by insisting upon a warranty, unless the purchaser expected and intended to suffer any loss arising therefrom." (*Moses v. Mead*, 1 Denio, 378.)

rather than as a payment on account, strictly speaking, a corresponding train of thought may be fairly presumed to have operated on the minds of the parties as inducement to the contract, to the effect that if the buyer fail to pay the balance of the purchase price, he cannot rescind the trade and have his advance returned. Neither is it just that, a time of delivery being agreed on, the buyer should neglect to make good his purchase by paying up the balance, and keep the seller bound, while he is free to lose his forfeit, or make it good and keep the trade open to suit his convenience. It cannot be that one party is bound and the other free.¹

§ 163. Sale of swine affected by contagious disease.—

Notwithstanding the general rule that a purchaser should examine hogs before buying, and fails to do so at his peril, there being no express warranty, yet if a sale under a warranty be made of a lot of hogs, the warranty being that the whole drove sold are free from disease, which, from its infectious character, is dangerous to other like animals, and it afterward appear that they are so affected, the purchaser may recover on the warranty all his damages sustained by reason of the animals which he bought being so infected, and he is not bound, in the recovery, to the price of the animals purchased.²

¹ In *McElroy v. Parker*, Circuit Court Hancock County, Ill., Oct. 5th, 1874, plaintiff brought suit on verbal contract for sale of three hogs; he paid five dollars to defendant, at his farm, on the purchase, the balance to be paid in the town, at certain scales, on the 4th or 5th of March. Defendant went to the scales March 5th, and remained there with them an hour, to wit, from 11 to 12 o'clock until 2 in the afternoon, and no one coming to receive the hogs, he sent a message to plaintiff's house, of his readiness to deliver the hogs; plaintiff was not at home, and did not receive the message. Defendant returned with his hogs to his farm; and on the evening of the same day, plaintiff followed him to the farm and demanded the completion of the trade. The price of hogs had advanced, and defendant refused to comply; thereupon plaintiff brought suit. The Court held he could neither enforce the completion of the trade, nor have returned his forfeit of five dollars. Held, defendant fully complied with the terms of the contract on his part, and for the breach plaintiff must suffer.

² *Bradley v. Real et al.* 14 Allen, (Mass. 1867) 20. In this case, an action was brought to recover the price of fifteen pigs sold by plaintiff to defendants, by weight. To this claim defendant pleaded a warranty made by plaintiff to him, when he bought the pigs, that they were free from disease and sound; that these representations were false and fraudulent, and that plaintiff, when he sold them to defendants, knew them to be affected by an infectious disease; that they were all infected, and, in a few days after the sale, died from the disease which they had when bought.

§ 164. Words of commendation do not make a warranty.—A warranty is not to be inferred by mere words of commendation used by the vendor to induce the vendee to make the purchase; nor can a warranty that the hogs sold were fit for a specific purpose be implied from a knowledge on the part of the seller that the article is intended for such purpose;¹ and, even upon an executory contract for the sale of property, if the vendee finds the article received not of the kind contracted for, to preserve his rights he must return it to the vendor, or

These facts were shown on the trial, but the jury, under instructions from the Court, found for the plaintiff, and defendants appealed; the upper Court sustained defendants' exceptions, and set aside the judgment, and, on the case, ruled that "if the breach of warranty, or fraudulent misrepresentations on which the defendants rely, relates to the existence of a contagious or infectious disease in any of the pigs sold, the evidence offered that other pigs in the same drove had the disease, and that the plaintiff knew it, would be competent; it would obviously be admissible to show, upon the question of how much the pigs sold were reasonably worth at the time of sale, that they came from a drove in which they had been exposed to the disease, as this would affect their market value. And if they were sold in one lot, the value of the whole lot, when sold, would be the subject of inquiry, and they might be found to be collectively of no value, or of very little value, from their liability to communicate the infection, though some of them may not have died of the disease. It has been held, in a recent English case, that, in an action for fraudulently misrepresenting that a cow, sold to plaintiff, was free from infectious disease, if the plaintiff placed the cow with others which thereby caught the disease and died, he can recover as damages the value of all the cows. (*Mullett v. Mason*, Law Rep. 1 C. P. 559.) The nature of the subject-matter of the warranty or deceit is such that *when animals are sold in one lot together, the warranty or representation as to the whole lot being single*, we can have no doubt that the same principle should apply to the extent of a recoupment, and the right to recoup in damages should not be confined to the diminished value of those which are proved to have had the disease at the time of sale.

"In determining the damages caused to the defendants by the breach of warranty or deceit, the defendants were entitled to have the jury consider, in recoupment of damages, the whole loss to them occasioned by the presence of the disease among the animals purchased, as well among those which took the infection after the sale as those which had it when the sale was made."

¹ *Bartlett v. Hoppock*, 34 N. Y. 118. In this case, the vendor knew that the buyer desired a lot of hard, corn-fed hogs, suitable for sale in the New York market. Knowing these facts, the seller, who had a lot of common hogs, which were not fit for that market, offered them for sale to the buyer, a hog-broker, or agent to buy hogs for dealers in New York. To induce the purchase, the vendor declared that his animals were "hard, corn-fed" hogs, and they were accordingly bought and forwarded to New York, where they proved to be unfit for sale, being thin, soft, and apparently not "corn-fed."

The Court held this to be no warranty; that "a warranty of fitness of an article for a specific purpose cannot be implied from a knowledge, on the part of the seller, that the article is intended for such a purpose."

notify him of his objections, and offer to return it. The retention of the property without doing this, after opportunity to ascertain the defect, is an admission that the contract has been performed.¹

Any fraudulent practice by the seller, intended to deceive the buyer, or to induce him to refrain from due examination and inquiry, which, if made, would have shown that the animals would be unfit for the use intended, will amount to a warranty.²

§ 165. The distinction between "hog" and "pork" is one so manifest to ordinary understanding as apparently to need no explanation; but, in contracts for sale of hogs by weight, it appears that the distinction is not so clear. In an Indiana case, a contract for the delivery of "hogs," to be paid for at a certain price per hundred pounds "net," in the absence of any explanatory evidence, was held to refer to dead hogs ready for cutting up, and without blood, hair, or entrails.³

¹ Beck v. Sheldon, 48 N. Y. 365.

² 2 Kent's Com. 484. This distinguished writer says: "The writers of the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge. But the common law is not quite so strict. If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee. Even a warranty will not cover defects that are plainly the objects of the senses; though if the vendor says or does anything whatever with an intention to divert the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud."

³ Whitson v. Culbertson, 7 Ind. 195. The suit was on a contract in writing to deliver twenty-five fat hogs at four dollars net per hundred pounds; the defendant failed to deliver them, and plaintiff recovered seventy dollars damages, that being the difference between what he would have had to pay on the contract for the hogs and what he could have sold them for. In the decision the Court says: "The appellant, in his brief, insists 'that a hog is a hog, dead or alive, and that it is hard to make anything else out of a hog but a hog.' We think the reverse of this proposition would be nearer the truth, and that the appellant would be compelled to exert his capacity to the utmost tension before he would succeed in making a hog out of a hog; but he would find no difficulty in converting a hog into pork, lard, bacon, carcass, or almost anything else but a hog."

"In common parlance, undoubtedly, the term 'hog' is applied, not unfrequently, to the dead as well as to the living.

"This circumstance tends to produce some ambiguity in the contract under consideration. That ambiguity might have been removed by the averment, in the pleadings or proofs upon the trial, of extrinsic facts, which would have demonstrated the intention of the parties."

"We understand that, among hog-dealers, two descriptions are recognized, to wit, gross hogs and net hogs; that the gross hog is the live hog, and the net the

But such, in many, if not most, of the hog-raising States, would not be the interpretation, by usage, given to similar language; the general custom being to sell hogs on foot at the weight exhibited by them after driving to market. The term "net" might be well understood to mean what would be their weight at the moment of sale as contradistinguished from what had been their weight when taken from the raiser of the animal; the words "net weight" being used to designate their exact commercial value at the time of sale, when they had suffered all the loss incident to departure from home, driving, and being in strange quarters.

§ 166. The business of preparing pork for market, by killing the hogs, cutting up, dressing, and packing the carcasses, has so far assumed, in some of the United States, the condition of a recognized trade, as to give rise to the custom, by the hog-raiser, of intrusting swine to the hands of persons who make a business of thus fitting the property for sale in the usual course of trade, or for transmission to the established pork markets.

Those who assume this calling, and hold themselves out to the public as being competent to do the work, are regarded by the law as giving a guaranty to those who employ them that they possess the requisite skill, knowledge, and experience which such a business requires, and they are responsible for losses which result from their lack of skill or care in doing the work intrusted to them.¹

dead hog, without blood, hair, or entrails, and ready for cutting up. What kind was contemplated in the contract under consideration? As the net hog was to be paid for, the natural inference, un rebutted, would be that the net hog was to be delivered."

¹ *Forman v. Miller*, 5 McLean, 218. This suit was on a contract in which defendants, who were pork-packers, agreed to cut up and pack hogs enough to make fifteen thousand pounds of "prime" and "mess" pork; the price for packing, salt, etc., was duly agreed upon, and the hogs were killed, dressed, and packed by defendants, and delivered to plaintiffs under this contract. When the pork arrived at the place of sale, four hundred and seventy-three barrels were found to be damaged, and unsalable as a first-rate article; there were some circumstances, the heat of the weather, and other ascribed causes, for the pork being bad, but the Court held the packers responsible for the loss, and said: "The weather was, undoubtedly, very unfavorable for pork-packing the season this pork was packed; but the experience and skill of the defendants were relied upon, and they should have acted under a knowledge of such responsibility. Under such circumstances, the skill of the defendants is specially required.

§ 167. As to damages by hogs in trespassing upon crops, the common-law rule made the owner liable. The owner could not permit his animals to run at large, and trespass upon the grounds of other persons; and if he did so, such owner generally was liable, for the injuries thus committed, in an action of trespass. The owner of the crops or grounds thus trespassed upon could legally drive away the animals, found *damage feasant*, from his ground, by such means, and use such force, as might be necessary for that purpose; but if, in driving off the animals, more force was used than was necessary for that purpose, and injury to the animals resulted therefrom, the owner would be entitled to damages resulting from the excess of force.¹

The same general principle applies in the United States, but it is, as a rule, much weakened by the statutes prescribing what shall constitute lawful fences, and to the effect that only trespasses which are committed on lands which are inclosed by such fences shall be answered for by the owners of the animals.²

They should have declined killing the hogs if they did not believe the pork could be saved. After this advice, had the plaintiffs directed them to kill and pack the pork, they would have been exonerated from any liability, had they put up the pork as carefully and skillfully as could be done by persons acquainted with the business. Persons undertaking to pack pork are bound to exercise all the skill and care which the business requires. And if any part of the pork packed proves to be unsound, the jury will ascertain whether the unsoundness was attributable to the manner in which it was put up.

"The damages sustained by the plaintiff, for whom the work was done, may be ascertained by comparing the sales of the unsound article with the market price for a good article." (Lawrence v. White, 5 McLean, 108.)

¹ 1 Mass. 33; 4 Met. 589; 19 Johns. 385; 3 Wend. 142; 16 Conn. 200.

² Mardsee v. Sutton, 2 Jones' Law R. (N. C.) 146. In this case, the hogs got into defendant's corn in the night-time; his son and a slave boy beat, drove, and shot them so that they were badly injured; the owner of the hogs brought his action for damages.

The Court held the father of the boy and owner of the slave responsible for the damage done the hogs with his connivance. The language of the decision is: "If a father, at the request of his son, agrees that his slave may go and aid the son in driving hogs out of the son's field, and the son, with the assistance of the slave, willfully and wantonly kills some of the hogs and injures others, the father is not liable in an action of trespass. But if, at the time the father agreed that his slave might go, he knew, or had reason to believe, that the son intended to, or would, kill the hogs, or otherwise injure them, then the father is liable to the owner of the hogs in an action of trespass for the damage done, as an aider or abettor, under the rule, *qui facit per alium, facit per se*, and in trespass all are principals."

In an action for trespass by hogs, all that the plaintiff can recover is the actual damages sustained; he cannot shut the hogs up and recover, in the same action, pay for their keeping. The measure of damages is what it is at the time it is done; it cannot be estimated upon the basis of what would perhaps, or even probably, be the ultimate result upon the crop when it should become matured; and where the injury is to a growing crop, no regard should be had as to how much the harvest would be affected, except so far as anticipated results give an immediate value to the crop. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences.

The mode of ascertaining damages, where the question is as to their amount, should be what the growing crop would sell for before and after the damage done; the difference is the proper measure of damage.¹

§ 168. The killing of hogs, found damage feasant, is not regarded with favor. Summary modes of obtaining relief

Woodward v. Purdy, 20 Alabama, 379. In an action to recover damages for injuries done to plaintiff's hogs, which had broken into defendant's inclosure, it was held that the defendant cannot recoup for damages done to his crop by the hogs when it appears that his fence was not "a lawful fence," agreeably to the statute.

¹ Sedgwick on Measure of Damages, marginal page 95: note Ibid, marginal page 56 et seq.; *Hays v. Christ*, 4 Kansas, 350: Christ brought an action against Hays for damages done to his growing crop by defendant's hogs. On the trial the plaintiff was permitted to show what his crop would have been worth in the fall of the year had not the hogs injured it: on appeal, this was held to be error. The Court says: "The only just rule by which the damages, if any had been done to the crop, could be estimated, was to confine the testimony to what it was at the time the trespass was committed."

North v. McDonald, 47 Barb. 528. On the trial, it appeared, upon plaintiff's showing, that certain stray hogs had entered his wheat field; that he had shut them up in a pen, where he had kept them two or three weeks; he showed the damage to have been one dollar, and the cost of feeding the hogs while in his pen to have been another dollar; his suit was for these two dollars, a judgment for which he recovered in the Court of a justice of the peace.

On appeal, this was reversed by the County Court, and the judgment of the County Court was sustained by the Supreme Court. The opinion of the Supreme Court was that the justice erred in receiving evidence of what it was worth to keep the hogs after they had been taken up. That was no legal element of damages which the plaintiff had the right to recover in an action for the trespass. He had no right to keep the hogs in his possession indefinitely and recover for their keeping. By shutting up the hogs in his own pen and keeping them there,

are prescribed by the statutes of the several States, and the common-law action, where the statute law fails to make ample provision, is sufficient to fairly protect the farmer from the ravages of his neighbor's hogs.¹

The law is not for the benefit of one, but for all. It is not its province to furnish an arm for passion, even when most excited by circumstances of aggravation, but to do justice to all, and by its passionless voice declare the rule of abstract right, without regard to the personal feelings of the individual.

From this, it results that, where an act is committed which is characterized by circumstances of oppression and a willful disregard of the law, to the injury of another, exemplary or punitive damages are allowed.²

as detailed by the evidence, he became a trespasser *ab initio*. It was his own voluntary act, without the knowledge or consent of the defendant.

¹ *Morse v. Nixon*, 6 Jones' Law Rep. (N. C.) 233. Where it was proved that a hog had killed one chicken, and attempted to kill another, and, being found seventy-five yards from where the defendant's chickens usually ran, was destroyed by him, it was held to be error to leave it to the jury whether the hog was of a predatory character, and had the reputation of being a "chicken-eating hog," and to instruct them that, if such was the fact, any one had a right to destroy it as a public nuisance.

The opinion of the Court is: "We do not concur in the opinion of his Honor as to the right of killing hogs that are in the habit of eating chickens. The position, that such a hog is a public nuisance and may be killed *by any one*, is not supported on principle or authority, and, if recognized, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved; for its exercise would stir up the most angry passions, and necessarily result in personal collisions." It may be the killing will be justified, by proving that the danger was imminent, making it necessary, then and there, to kill the hog to save the life of the chicken; but we are inclined to the opinion that, even under these circumstances, it is not justifiable to kill the hog. It should be impounded, or driven away, and notice given to the owner, so that he may put it up." (*Canon v. Hersey*, 1 Houston [Del.] 440.)

"If a person impounds swine *damage feasant*, and kills them while so in his possession, or injures them, so that they afterward die when set at large, it will be such a destruction as will constitute a conversion in law of the property, and trover will lie for it. But if the same is done while the hogs are *damage feasant*, or running at large, and not so in his possession, trespass, and not trover, is the proper remedy."

² Sedgwick on the Measure of Damages, marginal page 38; *Ibid*, marginal page 97; "for, where the act complained of is tainted by fraud, malice, or insult, the jury, which has the power to punish, has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or punitive damages." (*Ibid*, 455 et seq.; *Champion v. Vincent*, 20 Texas, 811.)

The law supposes that every trespass committed upon property is necessarily attended with some damage, however inconsiderable the injury; and hence the right to a recovery for a trespass cannot be denied.

But this was not a bare, technical trespass. It was committed deliberately, in willful violation of plaintiff's rights, in a manner and under circumstances of aggravation, showing a violent, reckless, and lawless spirit; and, in such cases, the law allows damages beyond the strict measure of compensation, by way of punishment, and for example's sake.

Where the defendant, whose fence was not a lawful one, shot plaintiff's hogs, there being a bad state of feeling between the parties, it was held that defendant was liable to exemplary damages, and a verdict which awarded against him such damages was sustained, although it appeared that he had been injured by the hogs trespassing upon and injuring his crop, and they were doing so when they were shot.

FARM—15.

CHAPTER XV.

DOGS.

- § 169. Property in dogs differs from that of other animals.
- § 170. The law will protect owners of dogs in their property.
- § 171. Police power to regulate keeping of dogs.
- § 172. Sheep-killing dogs.
- § 173. The law of a dog-fight.
- § 174. A person may kill a dog assaulting him.

§ 169. Property in dogs differs from that in other animals.—As to the ownership of dogs, the law has long made a distinction between them and the other domestic animals, because of their natural tendencies and the purposes for which they are kept. Beasts which have been thoroughly tamed, and are used for burden, or husbandry, or for food, such as horses, cattle, and sheep, are as truly property and entitled to protection as any property can be. But dogs never, even in a state of domestication, wholly lose their wild natures and destructive instincts; they are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and, therefore, although a man may have such a right of property in a dog as to maintain trespass or trover for *unlawfully* taking or destroying it, yet he has generally been held, in the phrase of the books, “to have no absolute and valuable property therein,” which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons, as he would be for the trespasses of his cattle.¹

¹ 2 Bl. Com. 399 et seq.; 3 Ibid, 7 et seq. In speaking of distress for rent, the learned author says: “As everything which is distrained is presumed to be the property of the wrong-doer, it will follow that such things, wherein no man can have an absolute and valuable property, (as dogs, cats, rabbits, and all animals *feræ naturæ*) cannot be distrained.”

And dogs have always been held, by the American Courts, to be entitled to less legal regard and protection than more harmless and useful domestic animals.¹

§ 170. The law will protect owners of dogs in their property.—Although the distinction is apparent between dogs, as property, and other domestic animals, it by no means is true that ownership of dogs is without legal protection. The owner may recover damages for injury to them, and no person is justified in treating them cruelly; the law will give redress for such misconduct and injury, as in cases of injury to other property.

Thus, in the matter of trapping dogs, by taking undue advantage of their natural instincts, one cannot shelter himself

Mason v. Keeling, 12 Modern Reports, 336. "If any beast, in which I have valuable property, do damage in another's soil, in treading his grass, trespass will lie for it; but if my dogs go into another man's soil, no action will lie."

Milten v. Fandrye, Pop. 161; *Read v. Edwards*, C. B. (N. S.) 245. So, also, in the criminal law, a dog has generally not been regarded as being property in the absolute sense in which other domesticated animals are held.

Reg v. Berry, 8 Cox's Crim. Cases, 115, which was larceny of dogs. The prosecutor, who resided at Harblepool, was the owner of two dogs, which he advertised for sale. The prisoner made application to have the dogs sent to him at Liverpool, on trial, falsely pretending that he was a person who kept a man-servant. By this pretense the prosecutor was induced to send the dogs to Liverpool, and the prisoner there obtained possession of them and sold them. The dogs were pointers, useful for the pursuit of game, and of the value of £5 each. The prisoner was convicted, and sentenced to seven years' penal servitude.

On behalf of the prisoner, a question was reserved for the consideration of the Court of Criminal Appeals, "whether the said dogs were chattels?"

The Court of Appeals discharged him, holding that the "conviction cannot be sustained. There is a specific mitigated punishment in the 7 and 8 Geo. IV, Chap. 29, Sec. 31, for dog-stealing, but it is not larceny at common law"; and the term "Chattels, in the section relating to false pretenses, applies only to such things as were the subject of larceny at common law."

"From the Year Books downward, dogs have always been held not to be the subject of larceny at common law."

American Criminal Law, Wharton, Vol. 2, Sec. 1755. "But as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable, or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. It is otherwise, however, when they are taxed."

Putnam v. Payne, 13 Johns. 312. *Per curiam*: "The defendant was fully justified in killing the dog, under common-law principles; the dog was a dangerous animal, and his master knew it, yet permitted him to run at large. Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance. We do not mean to say that this would be allowed as a justification for killing more useful and less dangerous animals, as hogs, etc."

¹ *Mitchell v. Williams*, 27 Ind. 62; *Carter v. Dow*, 16 Wis. 298; *Tenny v. Leng*, 16 Wis. 566; *Brown v. Carpenter*, 26 Verm. 638; *Woolf v. Chalker*, 31 Conn. 121.

from the consequences of an act of malice in availing himself of the hunger of a dog to lead him into danger, and it is unlawful for a man to tempt his neighbors' dogs into danger by setting traps on his own land, baited with strong-scented meat, or other similar contrivances, by which they may be allured to destruction—and there appears to be no just distinction between drawing an animal into a trap by his natural instincts, which he cannot resist, and putting him there by manual force. And a man must not set traps of a dangerous description in a situation to invite his neighbors' dogs, and, as it were, to compel them, by their instincts, to come to harm.¹

§ 171. Police powers to regulate keeping of dogs.—

The power of regulating by statute the keeping of dogs, under penalty of having them summarily destroyed in case of failure to comply with the laws on the subject of taxation of the owners, by special licenses being required to be taken out for dogs kept, has been freely exercised by the legislatures of most of the States; the object of these statutes being to prevent sudden assaults upon persons, worrying, wounding, and killing of neat cattle, sheep, and lambs, the distressing evils liable to result from canine madness, and other injuries likely to be occasioned by dogs.

These statutes, which have been the subject of much consideration and revision by the various legislatures, with a view of securing these objects, and of affording means for ascertaining the owners, and making them liable for the mischievous acts of their dogs, have accordingly not only provided that any person

¹ *Townsend v. Walker*, 9 East, 277. Cited approvingly in *Keefe v. Railway Co.* Supreme Court of Minnesota, January, 1875.

In *The People ex rel. Walker v. Court of General Sessions*, Supreme Court of New York, April, 1875, which was a dog tread-mill case, in which Walker, the proprietor of the dog, was convicted, and fined twenty-five dollars for cruelly beating a dog. The general term of the Supreme Court on *certiorari* unanimously affirmed the decision of the lower Court. Judge Davis, who delivered the opinion, says therein: "On the merits of this case, there appears to be no reason for interfering with the judgment. Although a dog is not a beast of burden, yet it is not cruelty to train and subject him to useful purposes. His use on a treadmill, or inclined plane, or in any mode by which his strength or docility may be made serviceable to man, is commendable, and not criminal, but his abuse, when so employed, whenever it amounts to cruelty, is a crime, and punishable precisely under the same circumstances as the cruel usage of the higher animals."

might kill a dog assaulting him,¹ or attacking sheep, out of its owner's inclosure,² but that the owner should be responsible in either single, double, or treble damages for mischief committed by his dog.

These statutes have been administered by the Courts according to a fair construction of their terms, and held to be reasonable and constitutional regulations of police.³

¹ *Brown v. Carpenter*, 26 Vt. 638. The opinion, by Chief Justice Refield, is to the effect that a ferocious dog, known by the person who keeps him to be accustomed to bite mankind, is to be regarded, when allowed to run at large, as a common nuisance, from his known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats, and domestic animals, from their ferocious and dangerous habits becoming known to their keepers, thus become nuisances if not restrained. "But such an animal is quite as obviously within the general definition of a common nuisance as a wolf, a wild-cat, or a bear, and, if allowed to go at large, as really deserves to be destroyed."

"If any animal should be regarded as the common terror of all peaceable and quiet-loving citizens, it is such a dog; and the owner who persists in keeping such an animal, without effectually and physically restraining him so that he can do no one harm, ought not to complain of his destruction. He ought to be grateful to escape so; for he undoubtedly is liable to, and justly deserves, exemplary punishment under the criminal laws of the State; and if one injured, or liable to injury, chooses to right himself by abating the nuisance only, he deserves to be regarded as a public benefactor."

Wolf v. Chalker, 31 Conn. 121. "A ferocious dog, accustomed to bite mankind, is a common nuisance, and if found running at large may be destroyed by any one. If sued for the killing of such a dog, the defendant need not aver or prove knowledge, on the part of him who harbors the dog, of his evil propensities in this respect."

The *keeping* of such a dog is *wrongful*, and, *prima facie*, the owner is liable to any person injured, and the plaintiff may recover without proving negligence in securing or taking care of him; nor is the negligence of plaintiff, to such a suit, a defense.

Such a dog is a dangerous instrument for protection, and placing him for that purpose can only be justified in cases where the placing of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner, under his personal direction, be justified, where a like degree of injury may not be lawfully inflicted by a different instrument.

A ferocious dog, addicted to biting mankind, and suffered to run at large, (unmuzzled) is a common nuisance; any person may kill it, independent of any statute authority, and independent of the question whether it was doing or threatening injury at the time of the killing, or whether the owner had notice of its disposition.

Maxwell v. Palmerton, 24 Wend. 407; *Dunlop v. Snyder*, 17 Barb. 561; *People v. Board of Police*, 15 Abbot's Pr. Rep. 167; *Leonard v. Wilkins*, 9 Johns. 233; *Hinckley v. Emerson*, 4 Cow. 351; *King v. Kline*, 6 Penn. St. 318.

² Killing a dog while in the act of chasing and worrying sheep is a justifiable act, and the owner of the dog cannot recover his value. (*Brown v. Hoburger*, 52 Barb. 15.)

³ *Morey v. Brown*, 42 N. H. 373. "The provisions of N. H. Rev. Stats. Chap.

§ 172. Sheep-killing dogs.—The responsibility of the owner or harbinger of a dog, for his acts, is peculiar, and characterized by the evil propensities natural to the species.

If domestic animals, such as oxen and horses, injure any one, in person or property, so long as they are rightfully in the place where they do the mischief, the owner of such animals is not liable unless he knew that they were accustomed to do mischief, and kept them so negligently and carelessly that injury resulted therefrom.¹

But in case of damage done by dogs, no *scienter* need be alleged or shown; and the owner of a dog cannot allow him to run at large, even on his own premises, without *some* risk to himself in becoming liable in damages for his assaults on man or beast.²

It is true that the authorities are not uniformly to this effect,

127, authorizing the killing of any dog found without a collar, is not in conflict with the constitution of the State; and where a statute provides that no person shall be liable for killing any dog which shall be found not having a collar of brass, tin, or leather, with the name of the owner or owners carved or engraved thereon, actual notice of the ownership of the dog found without such a collar will not make a person liable for killing it."

Carter v. Dow et al. 16 Wis. 298. "The act to regulate and license the keeping of dogs is an exercise of the police, and not of the taxing, power of the State, and is constitutional."

¹ Decker v. Gammon, 44 Maine, 322. "If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief before, if such animal is rightfully in the place where it does the mischief. (Vrooman v. Sawyer, 13 Johns. R. 339; Buxendia v. Sharp, 2 Salk. R. 662; Rex v. Huggins, 2 Ld. Raym. 1853.) "There is a difference between beasts that are *feræ natura*, as lions and tigers, which a man must always keep at his peril, and beasts that are *mansuetæ natura*, and break through the tameness of their nature, such as oxen and horses. In the latter case, an action lies, if the owner has had notice of the quality of his beast; in the former case, an action lies without such notice." (Jenkins v. Turner, 1 Ld. Raym. 109; May v. Burditt, 58 Eng. Com. Law, 94; Mason v. Keeling, 12 Modern Rep. 333; Lyke v. Van Lewis, 1 N. Y. 515.)

² Wolf v. Chalker, 31 Conn. 121; McCaskill v. Elliott, 5 Strobb. (S. C.) 196. "The owner of a dog keeps it at his own risk, being, without regard to care or negligence, an insurer against all the harm which he might reasonably have expected to ensue." (Pickering v. Orange, 2 Ill. 492; Loomis v. Terry, 17 Wend. 496. "A man may keep a dog for the necessary defense of his house, his garden, or his fields, and may cautiously use him for that purpose, *in the night-time*; but if he permit a mischievous dog to be at large on his premises, and a person is bitten by him *in the day-time*, the owner is liable in damages, although the person injured be, at the time, *trespassing* on the grounds of the owner by hunting in his woods without license. A person is not permitted, for the protection, in his absence, of property against a mere trespasser, to use means endangering the

and that it has been held that the owner of a dog was not liable for his acts of ferocity unless knowledge of his evil disposition was brought home to the owner.¹

But the general tenor of the rulings of the Courts has been such as to establish the proposition that he who keeps a dog does so at his peril of the natural propensity of the species to rapacity and ferocity.²

§ 173. The law of a dog-fight cannot be regarded as settled, because, although cases have occurred wherein the legal principles affecting such controversies have been considered, the real parties in interest, the true belligerents, could not well be heard by the Courts in their own behalf.¹

life or safety of a human being, whatever he may do where the entry upon his premises is to commit a *felony*, or breach of the peace; and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding; full notice of the mischief to be encountered must be given, and the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues." (Sherfey v. Bartlett, 4 Sneed, (Tenn.) 58; McCarthy v. Guild, 12 Met. 291; Smith v. Montgomery, 52 Me. 178; Wirth v. Allen, 3 Allen, 191.) "In an action to recover double the amount of damages sustained from the bite of a dog, (Rev. Stats. Mass. Chap. 58, Sec. 13) it is not necessary to prove that the owner knew of the vicious character of his dog, or that the dog was accustomed to bite."

¹ Fairchild v. Bentley, 30 Barb. 147. The defendant's dog was under his wagon in the shed of an inn where the defendant was a guest; the dog bit plaintiff, the inn-keeper, while he was unhitching the horses to move them. Held, that whether the dog was or was not *quoad*, the master, who had tried to send him home, an involuntary trespasser, the defendant was not liable, unless he knew that the dog was of a vicious character; and that such knowledge could not be inferred from the subsequent conduct of the dog.

² Kertschake v. Ludwig, 28 Wis. 430; Lavarone v. Mongiatti, 41 Cal. 138, in which it was said: "The owner of a ferocious dog, knowing the vicious propensities of the animal, keeps it at his own risk, and is responsible for any injury inflicted by it upon a person who is free from fault. A person may keep a ferocious dog, and he has, lawfully, the same right to keep a tiger. The danger to mankind, and the injury, if any is suffered, comes from the same source, the ferocity of the animal. In determining the responsibility of the keeper for an injury inflicted by either animal, the only difference between the two cases is, that in the case of an injury caused by a dog, the knowledge of the keeper that the dog was ferocious must be alleged and proven, for all dogs are not ferocious; while in the case of a tiger, such knowledge will be presumed from the nature of the animal. This knowledge, however established, whether by evidence or by presumption, is the same in substance and works the same results." (Partlow v. Haggerty, 35 Ind. 178; Kelly v. Tilton, 2 Abb. [N. Y.] 495.)

Scienter.—The liability, under N. H. Gen. Stat. Chap. 105, Sec. 8, of the owner or keeper of a dog, in double damages, to one bitten thereby, is not affected by his ignorance of the dog's vicious habit. (Orne v. Roberts, 51 N. H. 110.)

¹ Wiley v. Slater, 22 Barb. 506. The distinguished jurist, W. F. Allen, J., who

The rules established by cases in which dogs have attacked human beings, and their owners have been held liable, do not always appear to be applicable to those wherein the attack is by

delivered the opinion in this cause in the Supreme Court, says: "This is the first time I have been called upon to administer the law in the case of a pure dog-fight. I have had occasion to preside upon the trial of actions for assaults and batteries, in which the masters of dogs have acquitted themselves in a manner which might well have aroused the envy of their canine dependents. I am constrained to admit total ignorance of the code duello among dogs, or what constitutes a just cause of offense, and justifies a resort to the *ultima ratio regem*, a resort to arms, or rather to teeth, for redress; whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight entitle the injured or offended beast to insist upon satisfaction. I know, and am glad to know, that no nice question upon the conduct of the conflict on the part of the principal actors arises in this case. It is not claimed, upon either side, that the struggle was not fair and dog-like in all respects. Indeed, I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate and control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they entered into and became a part of the domestic institution, to settle and avenge, in their own way, all individual wrongs and insults, without regard to what Blackstone, or any other jurist, might write, speak, or think of the 'rights of persons, or rights of things.'

"I have been a firm believer, with the poet, in the instructive, if not semi-divine right of dogs to fight; and with him would say:

'Let dogs delight to bark and bite,
For God hath made them so;
Let bears and lions growl and fight,
For 'tis their nature to.'

"It is possible, had the owners of both dogs been present, that the belligerents would have been changed, and the familiar questions growing out of *son assault demesne* and *mollitur manus imposuit* would have been presented, but no such questions are here made.

"The defense is not rested upon the principle of self-defense, or defense of the possession of the master of the victorious dog. Had this defense been interposed, a serious and novel question would have arisen as to the liability of the offending dog for excess of force, and whether he would be held to the same rules which are applicable to human beings in like cases of offending, whether he would be held strictly to the proof of the necessity and reasonableness of all the force exerted, under the plea that, in defense of his carcass or the premises committed to his watch and care, 'he did necessarily a little bite, scratch, wound, tear, devour, and kill the plaintiff's dog, doing no unnecessary damage to the hide or body of said dog.'

"Addressing myself to the question really made in the case," the learned judge continues, "it is one thing for a dog to be dangerous, and quite another to be unwilling to have strange dogs upon his master's premises. To attack and drive off dogs thus suffered to go at large would be a virtue. Owners of valuable dogs should take care of them, proportioned to their value, and keep them within their own precincts, or under their own eye. It is very proper to invest dogs with some discretion, while upon their master's premises, in regard to other dogs, while it is palpably wrong to allow a man to keep a dog who

one dog upon another. Owners of dogs are bound to take a care of them proportioned to their value, but that does not in all cases relieve the person who keeps a "fighting dog" from liability for damages done by his animal to another dog; and the rule is applicable that vicious dogs are a nuisance, and their owners must either kill or keep them in confinement, as soon as they have notice of their dangerous habits, or, failing thus to guard against their doing damage, be held to answer therefor.¹

§ 174. A person assaulted by a dog may kill it, when

—If a dog assault a person as he is passing, or cause him danger by frightening his horse on the road, it seems that the person so assaulted or endangered may protect himself from injury, or his horse from being bitten, by killing the dog; for,

may or will, under any circumstances, of his own volition, attack a human being."

¹ *Wheeler v. Brant*, 23 Barb. 324. This case does not fully sustain the preceding one, and may be considered, to a certain extent, as an adverse decision. Plaintiff had a small dog, a pet, or sporting animal, which followed him one evening to defendant's house, where plaintiff went to see defendant on business. The defendant had a large "fighting dog," and its owner was aware of his being quarrelsome; the big dog attacked the little one and killed him; plaintiff sued the owner of the victorious animal for the value of his pet, and recovered. The ruling of the Supreme Court was that "where a dog, which has the vicious habit of attacking other dogs without being incited to do so, is suffered to go at large, and he attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it is shown that such owner had knowledge of the viciousness of his dog."

Heisrodt v. Hackett, Supreme Court of Michigan. Plaintiff was the owner of a small but intelligent and well-trained dog, which had such gifts, natural and acquired, as rendered him of especial value to plaintiff in the conduct of his business. There was a large, savage, and dangerous dog living near plaintiff's residence. This dog was without an owner. He was permitted to live, and was taken care of, on defendant's premises. The big dog killed the little one, and plaintiff sued defendant for damages. Defendant justified the conduct of the brute, with dogged persistence following the case into the highest Court, on the ground that the little one had no collar, nor his owner a license for keeping him, as, under a statute, they respectively should have had, or, failing in so doing, incurred danger of the dog's being killed by any constable or police officer.

The defense was not deemed good, and the Court held that there being no showing that the big dog had all of the official characteristics of constable or police officer; that in the killing he was in the discharge of his duty as a public functionary, or that, if he was, he duly ascertained the absence of the collar or the lack of a license before proceeding to act in a summary manner, and that therefore the defense could not be entertained; that where a statute authorizes a particular officer to perform an act, another cannot justify under the authority given. (4 Bl. Com. 178; Michigan Lawyer, 14 Alb. L. J. 122.)

although a man has a right to keep a dog for the protection of his house and yard, yet he ought to keep him secured, and not allow him to remain loose and uncontrolled at such hours and in such places as will endanger peaceable and honest persons from engaging in their lawful business.¹

But it must not be understood that the law regards dogs as absolutely without value, and a nuisance, of which any man may properly rid the land. By the common law, they are regarded in a different light to other domestic animals; but, for all that, they are a species of property for an injury to which an action at law may be maintained, and in such an action it is not necessary to show that the dog had pecuniary value; moreover, if the injury complained of is accompanied by circumstances of aggravation, "smart-money," or "exemplary damages," may be awarded for injury to him.²

¹ *Perry v. Phipps*, 10 Iredell, (N. C.) 262. "A person is not bound to stand quietly and be bitten by a dog, nor to give him what might be called a fair fight among men. But if a fierce and vicious dog be allowed to go at large, and he runs at a person as he lawfully goes to a house, or is passing along the road, apparently to set on the person, or, for example, on the horse he is riding, it seems but reasonable the person should protect himself from the injury of a bite, to himself or his horse, by killing the dog."

² *Dodson v. Mock*, 4 Dev. & B. (N. C.) 146; *Perry v. Phipps*, Ante; *The State v. Latham*, 13 Ire. 33. "A man has property in a dog, so that an indictment for malicious mischief in killing one will lie."

State v. Moses, 2 Dev. 452; *McKee v. Evans*, 1 Dev. & B. 243; *State v. Scott*, 2 Dev. & B. 35; *Porter v. Mise*, 27 Ala. (N. S.) 430. The language of the Court in the opinion is: "A dog is a species of property for an injury to which an action at law may be sustained. It is not necessary, for the maintenance of an action for shooting a dog, that the dog should be shown to have pecuniary value. Whenever there is a wrongful taking of the property of another, or a wrongful injury done to it, the law implies that the owner has sustained some damage; and although there be, in fact, no sensible damage for the loss or injury of the property, or from an actual deprivation of its use, the owner is entitled to recover some damages. And if the trespass on the property was accompanied by circumstances of aggravation, 'smart-money,' or 'exemplary damages,' may be assessed by the jury, although the property itself had no pecuniary value."

Board v. Head, 3 Dana, 488; *Major v. Pulliam*, 3 Ibid, 582; *Woert v. Jenkins*, 14 Johns. R. 352; 2 Starkie's Ev. 1450, 1451; *Bracegirdle v. Orford*, 2 Maule & Sel. R. 77; *Merest v. Harvey*, 5 Taunt. 442; *Dearing v. Moore*, 26 Ala. 586.

CHAPTER XVI.

DANGEROUS ANIMALS.

- § 175. Scienter, common-law rule as to.
- § 176. Owner liable for damage by vicious animal.
- § 177. Negligence in guarding dangerous animal.
- § 178. Harbinger of dangerous animal, liability of.
- § 179. Liability ceases when vicious animal is stolen.
- § 180. On sale of dangerous animal, notice must be given.
- § 181. Joint owners of dangerous animal, their liability.
- § 182. Measure of damages for injuries by vicious animals.
- § 183. The right to keep animals which are dangerous.

§ 175. Common-law rule as to scienter.—Injury by dangerous beasts of the several species known as domestic animals, which resulted from carelessness in keeping them, rendered the owners responsible, under the common law, in damages, where it was shown that the owner was aware that they were dangerous; and, where damages were claimed by reason of domestic animals acting in a vicious manner, it was essential to a recovery that the complainant should allege and prove that the owner of the beast knew of its vicious propensities, and so negligently kept it, that, by reason of the carelessness of the owner or keeper, the vicious propensity had an opportunity to manifest itself, to the damage of him who claimed to have been injured.

But, it having been shown that the animal was dangerous, and that of the fact that it was so the owner was aware, then the rule was that the beast should be killed, or kept in restraint, in order that the more valuable lives of persons and their property might have due protection; and if, from carelessness in keeping a vicious beast, or wantonness in leaving it at large, human life is lost, the owner of the animal is liable to criminal prosecution and punishment for manslaughter or murder.¹

¹ *Smith v. Pelah*, 2 Strange, 1264, in which "the chief justice ruled that if a dog has once bitten a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of the person who is bitten, though it happen by such person's treading on the

§ 176. Owner liable for damage by vicious animal, when.—In the United States, the owner of a beast known to be dangerous is liable to damage done by it, where such damage

dog's toes; for it was owing to his not hanging the dog on the first notice; and the safety of the king's subjects ought not afterward to be endangered. The *scienter* is the gist of the action."

A case is cited in an American report to the same point (see *Smith v. Causey*, 22 Ala. 571; *Beck and Wife v. Dyson*, 4 Campb. 198); but it does not seem to be wholly consistent therewith.

"It was a case for keeping a dog which bit the plaintiff, Mrs. Beck. She had been dreadfully bitten and lacerated by this dog, and the question was whether there was sufficient evidence of his being accustomed to bite, and of its being known to the defendant.

"It was proved that the dog was of a fierce and savage disposition, that the defendant generally kept him tied up, and that Mrs. Beck, having been bitten by him, the defendant promised to make her a pecuniary recompense; but there was no proof of his having before bitten any other person.

"It was submitted, that, from these circumstances, the jury would be warranted in inferring that the dog was accustomed to bite within the knowledge of the defendant; but Lord Ellenborough held the evidence insufficient, and directed a nonsuit."

In *Buxendin v. Sharp*, 2 Salk. 661, "the plaintiff declared that the defendant kept a bull that used to run at men, but did not say *sciens* or *scienter*, etc. This rule was held naught after verdict, for the action lies not, unless the master knows of this quality; and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration."

In *Jenkins v. Turner*, 1 Ld. Raym. 109, a boar had set upon, bitten, and injured a mare. It was charged that the owner knew of its being an animal of vicious disposition, and dangerous. On the trial, it was shown that the boar had bitten a child; that the owner knew that fact, and still allowed the boar to run at large. Although it was argued that the knowledge that the hog would bite children did not constitute information that it would injure mares, the Court held that the *scienter* was sufficiently shown, and the owner of the offending animal liable.

In *Rex v. Huggins*, 2 Ld. Raym. 1583, it was said by the Court: "There are, indeed, cases of murder, where no act was done by the persons guilty; as the letting loose of a wild beast which the party knows to be mischievous, and he kills a man, the owner of the beast is guilty of murder. There is a difference between beasts which are *feræ natura*, as lions and tigers, which a man must always keep at his peril, and beasts that are *mansuetæ natura*, and break through the tameness of their nature, such as oxen and horses. In the latter case, an action lies, if the owner has had notice of the quality of the beast; in the former case, an action lies without such notice.

As to the point of felony, if the owner has notice of the mischievous quality of the ox, and he uses all proper diligence to keep him up, and he happens to break loose, and kills a man, it would be very hard to make a man guilty of felony.

But if, through negligence, the beast goes abroad, after warning or notice of his condition, it is the opinion of Hale that it is manslaughter in the owner.

"And if he did purposely let him loose, and wander abroad, with a design to do mischief; nay, though it were but with a design to frighten people, and make sport, and he kills a man, it is murder in the owner."

is the result of want of due care on the part of the owner properly to guard his animal from doing injury; and the measure of care imposed is commensurate to the risk of danger to the public from the vicious propensity of the beast.

In America, the common-law rulings have been generally followed, and the decisions of the American Courts have been in accordance therewith. The application of the principle involved has been the principal matter considered in this connection, and incidentally thereto the question has arisen as to which is responsible for damage done by a vicious beast, the owner, or he who has the custody of it.

The owner of a vicious animal is an insurer against all harm which might reasonably be expected to result from the propensity of his animal to do damage;¹ but this insurance cannot be

¹ *McCaskill v. Elliott*, 5 Strobb. S. C. 196; *Woolf v. Chalker*, 31 Conn. 122; *Stumps v. Kelly*, 22 Ill. 140. This was an action on the case for injuries by a cow having hooked a woman, and caused great suffering, injury, expense of cure, and loss of time. The language of the Court, by Walker, J., is: "One person has no right, in the exercise of a trade or business, to endanger the life or health of another, nor by so doing to inflict an injury upon the person or property of another, while pursuing his lawful avocations.

"While the appellant has the undoubted right to hold and enjoy the property, the appellee has the right to pass the public highway without being injured by the property of the appellant. And appellant, failing to restrain this animal, after knowing its propensity to hook persons, is liable to injuries that may result to persons by her running at large. 'But if the ox were wont to push with his horns in times past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned and his owner shall be put to death.'

"When it is thus commanded by the great Jehovah, when he made his law known to man in the midst of thunders and lightnings, and the deep cloud that enveloped Sinai, attesting His visible presence, we have no right to disregard the principles of divine justice thus announced.

"The principle contained in the revelation applies with full force to a case resulting only in an injury, and unquestionably requires that it shall be compensated by payment of damages by the owner of the animal to the person injured.

"By the law of the twelve tables, it was provided that 'if a horse, apt to kick, should strike with his foot, or if an ox, accustomed to gore, should wound any man with his horns, an action was given to the party injured.' (*Cooper's Inst.* 337.) And by the common law, the owner of domestic or other animals, not naturally inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to persons or to property, unless it can be shown that he previously had notice of the animal's mischievous propensities, or that the injury was attributable to some other neglect on his part; it being generally necessary, in an action for an injury committed by such animals, to allege and prove the *scienter*. (1 Ch. Plead. 82.) But, with the notice of the vicious propensity of the animal, the action must be case and not trespass. Thus it is seen that the principle of responsibility by an owner of an animal

regarded as absolute; a man may keep an animal which is dangerous, provided he keeps him under restraint, so that persons pursuing their ordinary or lawful avocations are not exposed to danger.¹ The general rule by which this liability is to be ascertained is: 1st. The absolutely vicious character of the animal; 2d. The knowledge, on the part of the owner, of the fact that danger might reasonably be apprehended from his animal being at large.²

§ 177. Negligence in guarding dangerous animals.—Ordinary care in guarding animals, which, from their sex or nature, may be vicious, is a duty which the citizen owes to the community, and which he neglects at his peril.

accustomed to commit injury upon mankind, and knowing its vicious propensities, is imposed for all injuries it may inflict, and is recognized by the divine, and the civil, as well as the common law." (*Goodman v. Gay*, 15 Penn. 188; *Dickson v. McCoy*, 39 N. Y. 451; *Popplewell v. Pierce*, 10 Cush. [Mass.] 509; *Kittredge v. Elliott*, 16 N. H. 77; *Wheeler v. Brant*, 23 Barb. 324; *Koney v. Ward*, 36 How. P. R. 255; *Marsh v. Jones*, 21 Vt. 278.) "Defendant, knowing the ferocious disposition of his dog, and that it had been accustomed to bite persons, and in particular that, when left guarding his team in a village street, it had attacked persons passing along the highway, afterward left it unsecured and unmuzzled, in or near his sleigh, near a village sidewalk, and a child of seven years, passing on the sidewalk, came to the sleigh and meddled with the whip lying therein, and was thereupon thrown down and bitten by the dog. Held, that plaintiff was liable for the injury, and the child's act in meddling with the whip was no defense." (*Meibus v. Dodge*, 38 Wis. 300; A. L. J. Feb. 19th, 1876, p. 133.)

¹ *Logue v. Linke*, 4 E. D. Smith, (N. Y.) 63; *Dearth v. Baker*, 22 Wis. 73; *Meredith v. Reed*, 26 Ind. 334.

² *Vrooman v. Sawyer*, 13 Johns. 339. "The defendant in error, who was plaintiff in the Court below, proved that the bull of the latter had gored his horse; but there was no evidence that the bull had ever before done similar acts, or that he had ever before been unruly. The justice gave judgment for the plaintiff below, the defendant in error.

"*Per curiam*.—The judgment is clearly wrong. If damage be done by any domestic animal, kept for convenience or use, the owner is not liable to action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief."

Lyke v. Van Leuven, 4 Denio, 128, which was a case where defendant's hogs had got into plaintiff's field and killed a cow and her newly born calf. The Court said: "There was sufficient evidence to warrant the jury in finding that the cow and calf were destroyed by the defendant's swine. But it was not shown that swine ordinarily have a propensity to attack and destroy animals in the condition of this cow and calf; nor was there any evidence that the defendants were aware of the vicious propensity, in this respect, of these swine. For these reasons the plaintiff wholly failed to show any right of action against the defendants.

"The *scienter* is the gist of the action in these cases, and the principle applies to swine as it does to other domestic animals." (*Van Leuven v. Lyke*, 1 Coms. [1 N. Y.] 515.)

No man has the right to suffer to run at large animals of a kind dangerous either to the person or property of another; and if he does, he is responsible for all damages which result from the acts of such animals; he is bound to exercise ordinary care to prevent injury being done by them to the person or property of another.¹

The degree of care required to constitute "ordinary care" depends upon the character and disposition of the animal, and the owner is liable for injuries done by an animal of the class *mansuetæ naturæ* only upon the ground of negligence, either actual or imputed by law, in view of the owner's having had express notice that the animal was individually of a mischievous disposition.²

¹ *Meredith v. Reed*, 26 Ind. 334. The defendant owned a stallion, which, previously to the year in which the occurrences detailed transpired, had been let to mares, but he was not, in this year, so let, because of the illness of his owner. He was a gentle stallion, and had never been known by the owner to be guilty of any vicious acts. Not being in use, he had been kept up in a stable for four or five months. He was secured in the stable by a strong halter and chain, fastened through an iron ring in the manger. The stable door was securely fastened on the inside by a strong iron hasp, passed over a staple, and a piece of chain passed two or three times through the staple over the hasp, and the ends firmly tied together with a strong cord. It was also fastened on the outside by a piece of timber, one end of which was planted in the ground, while the other rested against the door. The horse was thus secured on the day and night the injury occurred. The gate of the inclosure surrounding the stable was shut and fastened as usual. About eleven o'clock that night the horse was found loose on the highway, and did the injury complained of.

Early the following morning the outside gate was found open, with the log prop lying some distance to one side, and the chain which had been passed through the staple was gone, and the cord with which it had been tied was found cut, and the pieces lying on the floor.

It is contended, on the one hand, that ordinary care was all the law required of the defendant in this case. On the other, it is claimed that the utmost care was necessary to free him from liability. Ordinary care is all that the law required. What is ordinary care in some cases would be carelessness in others. The law regards the circumstances of each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam engine greater care is necessary than in the use of a plow. Yet it is all ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended."

² *Earl v. Van Alstine*, 8 Barb. 630; *Shearman & Redfield on Negligence*, Sec. 192; *Fairchild v. Bentley*, 30 Barb. 147. The defendant's horse having injured the plaintiff's mare by biting and kicking her, through the fence separating the plaintiff's land from the defendant's, held, that there was a trespass by the act of the defendant's horse, for which the defendants were liable, apart from any question on the part of the defendants. (*Ellis v. The Loftus Iron Company*, L. R. 10, C. P. 10.)

§ 178. Harboring of dangerous animal responsible for damage, when.—One who harbors a dangerous animal on his premises, though he be not its owner, is responsible for injuries committed by it while in his possession to the same extent as if he owned it.¹ But if a person finds upon his premises an animal which he knows to be vicious, and he, in good faith, attempts, but fails, to drive him away, he is not liable.²

In the text-books and reports of cases, the "owner" of the animal is designated as the person who shall be liable for damages caused by a vicious animal; but it should not be understood that, in all cases, this liability falls upon him who is the legal owner of the animal, or that he is the only person thus to be held responsible.

The owner of an animal, within the meaning of the rule, is the person who has the control of it, or whose duty it is to have such control. The owner is presumptively the person who should have the control of the animal; and from this arises a corresponding presumption of his liability. This may, however, be rebutted by a showing that he has not such control, or duty of control, and the responsibility is avoided by him if he can establish that fact.

§ 179. Liability ceases when vicious animal is stolen.—If the animal be stolen from the owner, or taken in replevin, or other claim of title which proves ultimately to have been without foundation, the person thus taking it, and not the real owner, becomes liable for damage done while thus removed from the owner's possession.

Where an animal is hired out, or even if it is simply lent, and the hirer or borrower has exclusive control over it, he, and not the ultimate owner, is liable.

But, with these exceptions, it may be taken as the law that

¹ *Wilkinson v. Parrott*, 32 Cal. 102; *Frammel v. Little*, 16 Ind. 251.

² *Smith v. Great Eastern R. R. Co.* 2 Law Rep. C. P. p. 4. The plaintiff was bitten by a stray dog, at a railway station, while waiting for a train. It was proved that at 9 A.M. the dog flew at and tore the dress of another female on the platform; that at 10:30 he attacked a cat in the signal-box, near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again, at 10:40, on the platform, where he bit the plaintiff. Held, no evidence to warrant the jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.

the party injured by a vicious animal may recover his damages from either the actual owner or the person having it in charge, where he can show that such owner or person in charge was aware of the evil propensities or dangerous character of the animal.¹

§ 180. In sale of dangerous animal, notice must be given.—As to what notice of the vicious propensities of an animal hired out or loaned, the bailor must give to the bailee, in order to shift from the owner to the temporary possessor the responsibility for the acts of a dangerous animal, necessarily, in this connection, becomes an important question.

Manifestly, where the possession is taken from the owner feloniously, or in any way against his will, he cannot be held liable for failure to convey the information that the animal is dangerous, and must be guarded to prevent him from doing injury; but it is the duty of the owner to communicate his knowledge upon this point to any person borrowing or hiring the animal. The duty is not alone to the bailee, but there is a responsibility to the public which must rest upon one or the other; primarily, this responsibility is imposed upon and accepted by the owner of a dangerous animal, who permits it to live, and he can only shift the burden of it by informing him upon whom he would put it off, of the risks he takes, so that he may elect whether or not to assume them.² A lender is bound to inform the borrower of any defects in the thing lent of which he is aware, which render it dangerous to the borrower; the obligation of a mere lender goes no further than this. He cannot be made liable for not communicating any thing which he did not *in fact* know, whether he *ought* to have known it or not.

One who lets a chattel upon hire is under greater obligations in this respect than a mere lender; in the former case he warrants the thing hired to be fit for the use contemplated, and therefore warrants it against vices of which he *ought* to be aware.³

¹ *Marsh v. Jones*, 21 Vt. 378; *Pickering v. Orange*, 2 Ill. 492.

² *Story on Bailments*, Sec. 275; *Blakemore v. Bristol R. R. Co.* 8 El. & Bl. 1035.

³ *McCarthy v. Young*, 6 Hurlst & N. 329; *Story on Bailments*, Secs. 383, 390, 391a.

§ 181. Liability of joint owners of dangerous animals.

— Joint owners of a vicious animal are each bound to restrain him; if he is not restrained, and one owner is sued and compelled to pay damages for an injury done by him, such owner cannot enforce a claim for contribution against the co-owner. The case is within the rule that there is no right to contribution between wrong-doers; and to show that, at the time of the injury, the animal was in the possession of the defendant, does not take the case out of the general rule. To constitute it an exception, the evidence must show an express undertaking on his part to indemnify his fellow-owner against any injury by the animal, or some circumstances from which such undertaking or obligation may be implied.¹

¹ *Moody v. Black*, 1 Sandf. 304; *Hawkins v. Applebee*, 2 Sandf. 421.

Spaulding v. Wm. E. Oakes, 42 Vt. 343. The plaintiff and defendant were the owners in common of a ram, which both parties knew to be vicious and liable to attack persons. The animal was kept for the separate use of both, each having the immediate charge of him from time to time, as occasion required.

At a time when the ram was so in possession and charge of defendant, one Mrs. Oakes, wife of Henry Oakes, while driving home her cows, was violently attacked by the ram, and injured.

Mrs. Oakes and her husband brought suit against the plaintiff in this action for the damages sustained by her; to this suit, the defendant in that, plaintiff in this, action, made defense of the general issue, and especially that, notwithstanding he was a co-owner, the ram, when he made the assault, was not subject to his control, but was in the possession of his co-owner, Wm. E. Oakes; that he was being kept by Wm. E. Oakes in his pasture, over which he, Spaulding, had no control, and in which he was not interested.

The cause was ably tried, and carried to the Supreme Court; Spaulding was held liable for the damage done. (*Henry Oakes and Wife v. Spaulding et al.* 40 Vt. 347.) The decision being that "a joint-owner of a ram is chargeable with damage done by it, by butting, while in the pasture of his co-owner, although the latter, of his own accord, and without permission of, or consultation with, the former, and in his absence, took the ram, and put it into his pasture, where the injury was done, without trying to restrain it, the former having given no directions as to restraining the ram, and not having been consulted as to the keeping, care, and management of it."

Thereupon, being compelled so to do, the defendant, Spaulding, paid a large portion of the judgment, nearly all of the costs and expenses of counsel, fees, etc., and brought this action for contribution.

The Court held that, under the circumstances, there could be no contribution; that "the plaintiff and the defendant were the owners in common of a vicious ram, and his vicious propensities were known to both parties. The animal was kept for the separate use of both, each having the immediate charge of him from time to time, as occasion required. At the time the ram did the injury, for which both were liable, he was kept by the defendant on his farm, with the knowledge and assent of plaintiff, although the plaintiff did not know of the defendant's taking him at the time when he was taken. The plaintiff knew

§ 182. The measure of damages for injuries by vicious animals is controlled by the general rules upon that subject.

Actual loss is the measure in tort where no circumstances of aggravation are shown,¹ and where the injury is done to property the rule of compensation can readily be applied; injuries to the person are, however, more difficult to estimate, and the jury cannot always be held to the strict line of compensation which makes good an actual loss.

In regard to personal trespasses generally, they are so frequently accompanied by circumstances of aggravation that the question of strict compensation is rarely raised. The damages for personal injury, in cases free from malice, or of simple negligence, where the rule seems to be the same, should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medical and other expenses, physical pain, and medical distress, as are fairly and reasonably the plain consequences to him of the injury.²

Remote or—as they are sometimes styled—consequential damages are not to be regarded, as the law prohibits any allowance for damages remotely resulting from the principal illegal act, or, in the language of Lord Bacon: “It were infinite for the law to judge the causes of causes, and their impulsion one on another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.”³

the defendant did not restrain the ram, and took no steps to do so himself. While being so kept by defendant, the ram, in consequence of not being properly restrained, inflicted said injury.”

Held, that the parties come within the general rule of wrong-doers, between whom there can be no contribution or indemnity.

¹ Sedgwick on the Measure of Damages, 5th Ed. 516, 586, 602.

² *Seger v. Bark Hamstead*, 32 Conn. 290; *Peoria Bridge Association v. Loomis*, 20 Ill. 235; *Masters v. Town of Warren*, 27 Conn. 293; *Lawrence v. Housatonic R. Co.* 29 Conn. 390; *Mason v. Town of Ellsworth*, 32 Me. 271; *Hunt v. Hoyt*, 20 Ill. 544; *Morse v. Auburn & Syracuse R. R. Co.* 10 Barb. 621; *Ransom v. N. Y. & Erie R. R. Co.* 15 N. Y. 415; *West v. Forrest*, 22 Mo. 344. If the injury be permanent, compensation should be given for the future as well as for the present disability. (*Frink v. Schroyer*, 18 Ill. 416; *Slater v. Rink*, 18 Ill. 527.)

³ In determining the item of compensation for personal injury, the profits of a future business, of which plaintiff has been deprived, are, in general, too remote as an element in the estimate of the damages. (*Ballou v. Farnum*, 11 Allen, 73; *Caldwell v. Murphy*, 1 Duer, 233; *Graber v. Darwin*, 43 Cal. 495; *Sedgwick on Measure of Damages*, p. 56.)

§ 183. The right to kill dangerous animals, in order to protect human life, cannot be questioned; but how far this right extends, in the matter of the protection of property alone, is a matter worthy of consideration.

A *dog* may be so ferocious as to become a public nuisance; and in such cases, if his owner permits him to run at large, any person may kill him. Public safety and convenience justify such a rule of law. The animal ceases to be reclaimed and domesticated; he is dangerous; is, in effect, a wild beast, and may be slain, independent of statute authority, and without regard to whether he was doing mischief at the time, or the question of whether his owner knew of his vicious disposition.¹

But this reasoning appears to be applicable to dogs alone, and there has always been esteemed to exist a marked distinction against them in connection with other domesticated animals.

Although the common law recognizes property in the dog, it has always been esteemed a base property, and entitled to less consideration and protection than property in other domestic animals.²

Other animals may become vicious and injure persons or property, and the injured party may have his action for damages,

Karr v. Parks, 44 Cal. 46. In this case, the plaintiff sued to recover for services rendered and expenses incurred in the cure of wounds inflicted upon his infant daughter by a vicious cow, which belonged to defendant; the jury awarded damages in the sum of \$3,262. The child, after the injury, had proper medical and surgical treatment, and recovered, but there remained an eversion of the lower eye-lid, which was an unseemly disfigurement of the face. The larger portion of the expense, of which plaintiff gave evidence, and for which he sought to recover, was incurred in the endeavor to remove this disfigurement. For this purpose the child was taken to San Francisco, and two surgical operations were performed, the first being a failure, the second partially successful; the amount of the verdict rendered it certain that the expenses attending these operations entered largely into their estimate of damages.

The judgment was reversed, on the ground that the evidence should have been excluded, on defendant's objection to it, as the damages sought to be proved, viz., the expenses of these two surgical experiments, after the general recovery of the child, were too remote; that "there would practically be no limit to the liability of the defendant if the father could pursue, at pleasure, a series of expensive surgical operations, for the purpose of removing every trace of the injury, and charge the defendant with the entire cost."

¹ *Leonard v. Wilkins*, 9 Johns. 233; *Hinkley v. Emerson*, 4 Cow. 351; *King v. Kline*, 6 Penn. St. 318; *Woolf v. Chalker*, 31 Conn. 121; *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerston*, 21 Wend. 407; *Brown v. Carpenter*, 26 Vt. 638; *People v. Board of Police*, 24 How. Pr. 481; *Brown v. Hoburger*, 52 Barb. 15.

² *Woolf v. Chalker*, 31 Conn. 121.

but may not kill them, unless it be for the immediate protection of human life, and, as it would appear from the later decisions, great damage to property.¹

¹ Ibid; *Morse v. Nixon*, 6 Jones N. C. 293, which was a case in which a hog was killed while chasing the defendant's chickens; it was shown that the animal was predatory, and had acquired the reputation of being a "chicken-eating hog"; and it was alleged to have been a *nuisance*, because of its propensity to eat chickens. The Court did not sustain this position, but held that "the position that such a hog is a *public nuisance*, and may be killed by any one, is not supported on principle or authority, and, if recognized, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved. It is provoking to see an old sow trying to catch young chickens, and snapping up one every now and then in spite of the noisy protestations and energetic remonstrances of the hen; but it is not reason, and therefore not law, that so valuable an animal may be destroyed to save the life of an unfledged chicken. At all events, the danger must be imminent, and the necessity be fully made out." (*Matthews v. Fiestel*, 2 E. D. Smith, 90; *Dodson v. Mack*, 4 Dev. & B. 146.)

In a later case, (*Williams v. Dixon*, 65 North Carolina, 416) the action was trespass *vi et armis*. "The plaintiff owned an ass, which he knew to be dangerous, and in the habit of pursuing and injuring stock, and, with a knowledge of such vicious qualities, he permitted him to run at large. Held, that if such an animal is found pursuing a cow, which he threw down, and was in the act of stamping her, when the defendant, believing it was necessary to kill him to save the life of his cow, killed the ass, that defendant was justifiable."

CHAPTER XVII.

PASTURAGE OF ANIMALS.

- § 184. General rules of bailment applicable to agistors.
- § 185. Agistors not insurers.
- § 186. Implied covenants on part of agistors.
- § 187. Negligence of agistor's burden of proof.
- § 188. Agistors' liability for trespass by animals.
- § 189. Agistors have no lien at common law.
- § 190. Agistors have no lien as bailees for hire.
- § 191. Agistors have possessory interest in animals.
- § 192. Agistor's powers when animals are injured or stolen.

§ 184. General rules of bailment applicable to agistors.

—One who takes animals to pasture at certain rates ¹ is a bailee for hire of custody, and within the general rule applicable to such bailments.² His contract with the owner of the animals is a hiring of care and attention, commensurate with the value and liability to injury of the animals intrusted to him; bailees of this sort, like other bailees upon a contract of mutual interest, are bound to ordinary diligence, and, of course, are responsible for losses by ordinary negligence.

By the Roman law, the agistor was made responsible, not only for reasonable diligence, but for reasonable skill in his business, which, indeed, is also true in the common law; he must, at his peril, know what are reasonable precautions against loss or injury to the animals, and take such precautions; ignorance of what is his proper duty is not only no excuse for a failure to discharge it, but is negligence, for which the law will punish by holding him responsible for resulting damages.³

§ 185. The agistor does not become an insurer of the animals left with him to pasture; if they stray from his premises, are stolen, or injured, he only is held responsible upon it being

¹ Bouv. Law Dic. Vol 1, 105.

² Jones on Bailments, 91, 92; Story on Bailments, Secs. 442, 443.

³ Dig. Lib. 19, Tit. 2, L. 9, Sec. 5; Pothier Pand. Lib. 9, Tit. 2, N. 29.

shown that the loss or injury occurred through his having failed to bestow upon them ordinary diligence and care; he only covenants to possess and exercise reasonable skill in his business, and he comes within the general rule given by Dr. Paley, in his treatise on Moral Philosophy: "He who undertakes another man's business makes it his own—that is, he promises to employ upon it the same care, attention, and diligence that he would do if it were actually his own, for he knows that the business is committed to him with that expectation; this he promises, and no more than this."¹

§ 186. Implied covenants by an agistor, to give due care, provide water, and not over-stock his land, result from the general rules on bailment applicable.

The covenant goes further than the language of the learned author, above quoted, in this, that it might well occur that the agistor gave such attention, skill, and care as he would have done had the property been his own, and yet fall short of the requirements of the law, for he might be a careless person, and habitually give to his own affairs less than a due amount of attention, skill, and care; the measure of the diligence required of him is, therefore, such as a prudent person would ordinarily give to his own business of a similar character, reference being had to local customs and usages, the value of the animals, their liability to injury or loss, and to the circumstances of each case. Thus, so over-stocking his land that proper pasturage for all the animals did not remain, willfully allowing them to be without water, negligently allowing his fences to remain in an insecure condition, or leaving open his gates so that the animals stray and are lost, are familiar instances of ordinary negligence, for damages resulting from which the agistor is liable.²

§ 187. Burden of proof on charge of negligence against an agistor.—As to where lies the burden of proof when negligence is the ground of a claim for damages, in the case of depositories for hire, where the property is lost or injured, the authorities are not agreed. In England, it is held that the

¹ Paley's Moral Philosophy, Book 3, p. 1, Chap. 12.

² Story on Bailments, Sec. 443; Jones on Bailments, 92; 1 Bell. Comm. p. 438, 5th Ed.; Ibid, Sec. 394, 4th Ed.

burden is upon the owner of the property ; that he must assume the proof of negligence, rather than impose upon the defendant the necessity of showing that he has exercised ordinary, reasonable care.

The general presumption obtains that the party who contracts to perform the service will do so in an honest, proper manner ; the bailee agrees to take such care of the property as he would do were it his own, and every one is presumed to take care of his own concerns, and there cannot be a doubt that negligence, in most of the different descriptions of bailees, should never be presumed.¹

In the United States, however, this general proposition has not been universally acceded to, and the rule, by the later decisions, stands so far modified in practical effect that, although in an action against a bailee for loss of or injury to the subject of a bailment, the burden of proof of negligence rests upon the plaintiff ; yet the nature of the accident, loss, or injury itself, may afford *prima facie* evidence of negligence. If it is one which, in the ordinary course of events, would not have happened but for the want of proper care on the part of the bailee, it is incumbent upon him to show that he took proper care and due precaution ; and his failure to furnish this proof, which, if it existed, would have been in his power, may subject him to the inference that such precautions were omitted.²

¹ 1 Ph. on Ev. 605. *Odiosa et inhonesta non sunt presumenda* (10 Rep. 56a.); *Injuria non presumuntur* (Co. Litt. 232b.); *Omnia presumuntur legitime facta donec probatur in contrarium* (Co. Litt. 232b.); *Fraus est odiosa et non presumenda* (Cro. Cur. 550) are maxims of daily application in our Courts.

Schmidt v. Blood, 9 Wend. 268. "A warehouseman, not chargeable with negligence, is not responsible for goods intrusted to him, stolen or embezzled by his store-keeper or servant; and the onus of showing negligence lies upon the owner."

² Boris v. Hartford & N. H. R. R. Co. 37 Conn. 272. "In the case of depositories for hire, where the goods are lost, the authorities are not agreed as to whether the burden of proof of negligence is on the owner of the goods, or of reasonable care on the depository. In England, it is held that the burden is upon the owner, but the Courts in this country have, in some cases, held otherwise."

Lichtenheim v. Boston & Providence R. R. Co. 11 Cush. 70. Goods on storage had been stolen. It was held that the warehouseman who fails to deliver property bailed to him is bound to show that the loss occurred without a want of ordinary care or diligence on his part, but not necessarily the precise manner in which the loss occurred, and the later English authorities tend to the same point. (Smith v. Cook, 1 Law Reports, 79, decided December 14th, 1875.) "An

§ 188. Agistor liable for trespass of animals, when.—

The agistor may become liable for trespass by the animals which he has in pasture. By the common law, a party into whose lands agisted animals escape, and there do mischief, may have his election against which party he shall maintain his action for the damage suffered. He may sue either the general owner of the animals, or the person who has them at pasture; and if the owner of the animals is, in the first instance, proceeded against, and he is forced by the law to make good the

agistor of cattle is liable for damages done through his negligence, by a vicious animal in his care, to another animal also in his care, although he may not have known the mischievous disposition of the former.

"Plaintiff delivered a horse to defendant, to be agisted, kept, and taken care of. The defendant placed the horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out.

"He, however, did not know that the bull was of a mischievous disposition. The horse was gored by the bull, and killed. Witnesses testified that it was imprudent to turn young horses among horned cattle; others, that there was no danger in such a practice.

"The Court left to the jury whether the defendant acted without reasonable and proper care in putting the colt in the field near the bull and with the heifers.

"Verdict for plaintiff.

"A *rule nisi* was obtained to enter a nonsuit, on the ground there was no evidence of scienter.

"Held, that defendant was bound to take reasonable care of the horse, and that if it was killed through his negligence he was liable, and that the doctrine of scienter ought not to be extended to a contract to take reasonable care.

"Rule discharged.

"Opinions by Blackburn, Quinn, and Field, J. J." (2 N. Y. Weekly Dig. 73, Mar. 6th, 1876; 3 Cent. L. J. March 24th, 1876.)

Alden v. Pearson, 3 Gray, 342. No demand is necessary before commencing an action for property lost or destroyed by persons having it in custody.

Collins v. Bennett, 46 N. Y. 490. A horse was delivered by plaintiff to defendant to be kept and cared for, with express directions to take his shoes off, and give him only such exercise as could be done by leading him round by a halter, and to let him go bare-footed all winter; defendant violated these instructions by keeping the horse shod, and allowing his wife to use it, and by using it himself; the horse was foundered and rendered worthless while in defendant's possession, and when found by plaintiff to be in this condition was abandoned to defendant, and this suit was commenced for the value of the animal before injury. Held, that a bailee for hire who uses the property contrary to instructions of the owner, is liable for a conversion thereof. Where property in the exclusive possession of such bailee is injured in a way that ordinarily does not occur without negligence, the burden of proof is on the bailee to show that the injury was not caused by his negligence.

Russell Mfg. Co. v. New Haven Steamboat Co. 50 N. Y. 121. "The nature may itself afford prima facie proof of negligence."

amount of damage done, he will have his remedy by action over against the agistor, if it appear that the trespass occurred by reason of his neglect or improvidence.

Under the common law, the owner or custodian of animals was bound to fence them in, rather than compel his neighbor to fence them out. The statutes of many of the States, and the rulings of the Courts in the United States, have established the converse of this as the rule; but if animals at pasture commit what the law makes an actionable trespass, the common-law rule yet remains in effect, that the agistor may be sued, or the owner of the animals be proceeded against, at the option of the party injured; in which latter case the owner of the animals would be entitled to recover from the agistor the amount which he had been obliged to pay, if the trespass can be traced to a neglect on the part of the bailee to take ordinary, reasonable precaution against the trespass.¹

§ 189. An agistor has no lien, at common law, for the pasturage of the animals which have been left with him, unless an express agreement to that effect is made by the owner.

Where a person is bound by the law to do certain things, by which are imposed on him expense or trouble, upon or about

¹ 4 Kent's Com. 120, Note b.

Sheridan v. Bean, 8 Met. 234. Certain horses which belonged to Bean were at pasture in Spencer's field. They trespassed upon the field of plaintiff, and the question submitted to the Court was whether the action of trespass, *quere clausum fregit*, would lie against the owner of animals at agistment, which have strayed from the agistor's field into the plaintiff's, and have done the damage complained of. It was held that he could, and the Court, by Hubbard, J., said: "In the case of trespass by cattle agisted, it is laid down, by approved writers of former times, that the party injured has his election to sue either the owner or agistor of the animals, though he can have but one satisfaction. '*Si mes avers sont en le gard de I. S. et durant cest temps font trespas al auter, il avera trespas vers moi on I. S. a son election, mes il navera satisfaction d'ambideux.*'" (2 Rol. Abr. 546, cites 7 Hen. IV, 31b.) "While there is an apparent hardship in subjecting a person to the action of trespass, where the cause arises from the neglect of another, yet we cannot overlook the necessity of the checks which are required to guard against this species of trespass, which is not only so easily committed, but is so difficult to prevent; and we think our ancestors intended to give an ample remedy by subjecting the owner, the agent, or bailee, and the offending animals themselves, to making good the damages thus committed. Nor does the hardship appear so great when we consider that the owner has his remedy against the person whom he employs, and, if he does not obtain satisfaction for his loss, it is rather he who employed a negligent person that should suffer, than the man who is injured by such neglect."

the personal property of another, he has a particular lien upon the property; this lien is given by the law as an offset to the arbitrary requirement that the service shall be performed when requested, in certain trades and occupations, which, to accommodate the public, must be so carried on that all persons may rely on being duly served, as their necessities may demand.

Upon this ground, common carriers, inn-keepers, and farriers had a particular lien, by the common law, because they were *bound*, in the line of their respective employment, to serve the public. Although it is probable that the right of lien in their favor had its origin in the compensatory principle indicated, and as an equivalent for the obligation to serve the public, this right of lien is not now confined to that class of persons who are engaged in the *quasi*-public character mentioned, and, in a variety of cases, a person has a right to detain personal property which has been delivered to him to have labor bestowed on it, who would not be obliged to receive it, in the first instance, contrary to his inclination.¹

¹ *Chapman v. Allen*, Cro. Car.; 2 Kent's Com. 635 and note d.

Goodrich v. Willard, 7 Gray, 183. An action in tort for conversion of cattle. At the trial, plaintiff showed that the cattle had been placed in his possession to be pastured; he claimed a lien on them for his bill for keeping them, and showed no other title. The Court held that plaintiff, as such agistor of the cattle sued for, had no such lien, and directed a verdict for defendant, on which, judgment was rendered for defendant, and plaintiff appealed.

The judgment was affirmed. The language of the Court, by Metcalf, J., was: "The sole question on these exceptions is whether an agistor of cattle has a lien on them for their keeping. He has by the law of Scotland, (2 Bell Com. 110) but the common-law authorities are uniform that he has not, except by special agreement with the owner." (*Jackson v. Cummings*, 5 M. & W. 342; *Cross on Lien*, 25, 332; 2 Saund Pl. & Ev. 2d Ed. 299.)

1 Dane, Abr. 232; *Crinnell v. Cook*, 3 Hill, (N. Y.) 491. "The right of lien has always been admitted where the party was bound by law to receive the goods, and in modern times the right has been extended so far that it may now be laid down as the general rule that every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery-stable keeper, for the reason that he only keeps the horse, without imparting any new value to the animal; and, besides, he does not come within the policy of the law, which gives the lien for the benefit of trade. Upon the same reason, the agistor or farmer who pastures the horses or cattle of another, has no lien for their keeping, unless there be a special agreement to that effect." But the question has recently undergone a good deal of discussion in England, and the result is that the old cases remain unshaken, and it must now be regarded as the settled

§ 190. An agistor has no lien as a bailee for hire, on the ground that his services have given an additional, special value to the animals which he has pastured.

It is now the accepted rule that every bailee for hire, who has given to the subject of the bailment an additional value by his skill and labor, has a charge upon the property for his compensation; thus, a miller who transforms wheat into flour, a tailor who makes the cloth into a garment, or the dyer who colors the cloth which is to be made into clothing, each give to the property a peculiar character or value, and this it is which is deemed to be their property, which, having a right to retain, the workman has a lien for.

But the agistor comes within neither of the classes of persons in whose favor a lien exists. He is not bound to receive animals on pasture; his is not, therefore, to the extent requisite, a public employment, and the necessity for his encouragement and protection, as such, does not exist. He gives by his labor or skill no additional value to the property, and hence all the standard authorities declare the rule to be that he has no lien for his compensation.¹

doctrine that agistors and livery-stable keepers have no lien, unless there be a special contract to that effect. (*Wallace v. Woodgate*, 1 Car. & Payne, 575; *Ry. v. Moody*, 193, S. C.; *Bevan v. Waters*, 3 Car. & Payne, 520; *Judson v. Ethridge*, 1 Crompt. & Mees, 743.)

Miller v. Marston, 35 Maine, 155. "The doctrines of particular liens, as applicable to inn-keepers and those who are bound to receive goods, and to bailees for hire, who by their labor and skill impart additional value to the goods, have never been extended by the common law to keepers of livery-stables or agistors of cattle." (*Story on Bailments*, Sec. 443.)

¹ It must be acknowledged that the doctrine of the text does not stand without apparent contradiction at the hands of writers of acknowledged ability, and judicial decisions by Courts of last resort. Thus, in Sec. 440 of *Story on Bailments* is found the following language: "Thus, a tailor, who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer until he is paid for his services. Neither is a ship-carpenter bound to restore the ship which he has repaired, nor a jeweler the gem which he has set, or the seal which he has engraved, *nor an agistor the horse which he has taken on hire*, until their respective compensations are paid." To this proposition the learned author cites 2 Roll. Abr. 92; *Blake v. Nicholson*, 3 Maule & Selw. 167; *Chase v. Westmore*, 5 Maule & Selw. 180; *Ex parte Deese*, 1 Atk. 228. But an examination of these authorities does not sustain the author in his deduction from them as to an agistor. The first, in effect, is against the proposition to which it is cited, and the others are silent upon it. *Blake v. Nicholson* declares a lien in favor of the printer who furnished paper and printed a work called *Dr. Hawker's Commentary on the Bible*, and in no wise touches upon the subject of lien in

§ 191. The agistor has a possessory interest in the animals which he takes to pasture, and in them has a temporary, qualified property. It is not an absolute property, because of his contract for restitution. He has a right of possession against every person except the true owner, and has, therefore, a cause of action against any person other than the owner, who may interfere with his possession, and can maintain trespass or trover against a wrong-doer for any injury to his possession, or any conversion of the property.¹

§ 192. Agistor's powers when animals are injured or stolen—How far he may maintain the action for recovery of damages for injury to the animals agisted to him, has been matter of some doubt; on one hand, it is argued that if an animal agisted is injured or killed, through malice or actionable negligence on the part of a person other than the agistor, the agistor, having no interest in the animal, should, therefore, have no action, as he is not injured; that the action can, therefore, only be maintained by the person to whom the animal belongs, as he alone is damnified. On the other side, it is urged that the bailee is interested to the extent of his bailment; that it would be impossible for him to pursue the vocation of an agistor if the animals intrusted to his care might be injured, and he be powerless to prevent it by a wholesome fear, on the part of the wrong-

favor of an agistor. *Chase v. Westmore* sustains a lien in favor of a miller, on the sole ground that he has, by his skill and labor, given a new and more valuable character to the property; and *Ex parte Deese* goes but to the length to declare that a lien exists for his compensation in favor of a packer of goods. Furthermore, the same author, in Note 3 to Sec. 443 of the same work, (*Story on Bailments*) says: "An agistor of cattle has no lien for their keeping, except by special agreement." From all of which it is proper to suppose that the language of Sec. 440, as to agistors, is the result of some oversight, clerical error, or misprint, rather than an intention on the part of the author to assume a position antagonistic to all the authorities, and to the note to Sec. 443.

It is true that, in some of the States, as in Nevada and Pennsylvania, there are express statutes giving a lien for board and pasturage of animals, and decisions have been rendered sustaining such statutory liens, but the general rule remains as given in the text.

¹ *Story on Bailments*, Secs. 93 and 443; 2 Roll. Abr. 551; *Sutton v. Buck*, 2 Taunt. 309, per Chambre, J. "An agistor, etc., a factor, a carrier, may bring trover; even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner. It would be monstrously inconvenient if a wrong-doer could come and take things out of the possession of him who had the possession under the rightful owner."

doer, of being held responsible to him who, having the property in his immediate charge, can most promptly bring to bear the remedial or punitive power of the law.

The authorities appear to favor the latter view, and from the decisions of the Courts it seems to be now established, with reasonable certainty, that, for damage done to animals in his charge, the agistor may recover, and if the animals be stolen he may, in his own name, cause the thief to be indicted.¹

¹ Story on Bailments, Sec. 443; *Burton v. Hughes*, 2 Bing. R. 173; *Rooth v. Wilson*, 1 Barn. & Ald. 59. In this case, it appeared that plaintiff had his brother's horse on pasture; the defendant owned and had possession of the adjoining land to plaintiff's pasture; and it was defendant's duty to maintain in repair the fence between the tracts; he neglected this duty; the horse got through the fence, and met with a fatal accident on defendant's premises. The liability to repair, the neglect to do so, and that, by said neglect, the horse was lost, were admitted by defendant, but in defense it was urged that plaintiff had not such a property in the horse as to entitle him to maintain this action. The learned judge who tried the case at *nisi prius*, however, suffered the case to proceed, and the jury found a verdict for the plaintiff.

An appeal was taken, and the judgment of the Court below was affirmed.

The several judges wrote separate opinions, all concurring, and that of Holroyd, J., covers all the ground. His opinion is as follows: "The plaintiff was entitled to the benefit of his field, not only for the use of his own cattle, but also for putting in the cattle of others; and by the negligence of the defendant in rendering the field unsafe, he is deprived, in some degree, of the means of exercising his right of using that field for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain this action." (2 Blackst. Com. pp. 452, 453.)

Where cattle were alleged in the indictment to be the property of the person who, it appeared in evidence, was merely the agistor, and not the actual owner, the judges, held, "that he may maintain trespass against any who takes the beasts, all the judges agreed that the conviction was right." (*Rex v. Woodward*, 2 Easts, Pleas of the Crown, 653.)

And so where a horse is sold at a repository, the auctioneer may maintain trespass, or an indictment for larceny, in his own name, if it be stolen before delivery. (*Williams v. Millington*, 1 H. Bl. 81.)

CHAPTER XVIII.

MALICIOUS INJURY TO ANIMALS.

- § 193. Malicious mischief as a common-law offense.
- § 194. Malicious mischief in the United States.
- § 195. Actual malice, against the owner, must appear.
- § 196. Criminal statutes as to injury of domestic animals.
- § 197. State laws as to malicious injury of animals.
- § 198. Laws in Georgia as to malicious injury of animals.
- § 199. Statutes concerning malicious injury of animals.
- § 200. State laws as to damage to domestic animals.
- § 201. Malicious injury of animals, criminal laws.
- § 202. Laws of several States as to injury of domestic animals.
- § 203. Criminal law as to malicious injury of animals.
- § 204. Statutes as to malicious injuries to animals.
- § 205. Construction of statutes for prevention of willful injury to domestic animals.
- § 206. The definition of malice.
- § 207. As to what constitutes "injury to animals."

§ 193. Malicious mischief as a common-law offense is, to all practical intents, unknown.

In England, as the several species of this class of crime became noticeable, legislative enactments were framed for public protection, and each, in turn, was specially provided against; and following the history of crime back as far as the reports go, there has scarcely been a conceivable instance in which mischievous injury to property would have been possible without contravention of a plain statutory provision.

This is especially noticeable in the matter of prevention of malicious injuries to animals; a series of statutes, twelve or more, beginning with 37 Henry VIII, Chap. 6, and ending with the "Black Act," 9 Geo. II, Chap. 22, which was passed "for the punishment of certain marauders who committed great outrages, disguised, and with faces blackened," were passed solely to prevent wanton mischief to domestic animals.

The provisions of these statutes were so minute that distinct penalties were prescribed for every conceivable offense: thus, the

cutting out of a cow,¹ the breaking of the fore-leg of a sheep when attempting to get out of an inclosure,² the wounding of cattle when the injury was only temporary.³

Something more than 1,800 sections, from the reign of Henry VIII to that of Geo. III, were enacted for the especial purpose of providing against malicious mischief, and the statutory provisions being so ample, and thus more specific and certain than the common law, the books in relation to this class of offenses give but few examples of common-law indictments.

§ 194. Malicious mischief in the United States has been the subject of frequent adjudications by the Courts, as the later English statutes do not control them; and, from the decisions of American Courts upon the topics involved, an American common law is to be deduced. In these cases, the proposition is generally maintained, that, without being obliged to rely upon special statutes, malicious mischief is a crime punishable under the law.⁴

Acts injurious to private persons, which tend to excite violent resentment, and thus produce a disturbance of the peace, have, in America, universally been held indictable; and it would appear that, although from the fact that the comparatively late provisions of the statute law in England have measurably superseded the common-law rules applicable to such offenses as, by their wickedness and enormity, lead to disregard of law and breaches of the peace, nothing is to be inferred against the maliciously injuring domestic animals being an offense at common law, from the circumstance that malicious mischief is punishable in England by statutes, which are there so universally re-

¹ Stats. 37 Henry VIII, Chap. 6; *People v. Brunell*, 48 How. Pr. 435.

² 9 Geo. I, Chap. 22, Sec. 6.

³ 9 Geo. I, Chap. 19.

⁴ *The People v. Smith*, 5 Cow. 258. The defendant was indicted for *maliciously, wickedly, and willfully killing a cow*. The Court said: "The offense is distinguishable from an ordinary trespass in this, that it not only is a violation of private right, without color or pretense, but without the hope or expectation of gain. Such an act discovers a degree of moral turpitude dangerous to society, and, for their security, ought to be punished criminally. It is an evil example of the most pernicious tendency, inasmuch as the act is an outrage upon the feelings and principles of humanity. The direct tendency is a breach of the peace. What more likely to produce it than wantonly killing, out of mere malice, a useful animal?" (*Republica v. Teischer*, 1 Dall. 355; *Commonwealth v. Taylor*, 5 Binn. 277; *Commonwealth v. Leach*, 1 Mass. 509.)

lied upon by reason of their ample provisions. The statutes there are so ancient, and the punishments provided so severe, that they have come to be habitually relied upon, and, as a matter of course, resulted in causing the common law to be lost sight of, though the statutes were doubtless intended as a mere increase of its penalties.¹

Thus, it may now be regarded as the common law in America that it is an offense to kill a horse belonging to another,² or a cow,³ or a steer,⁴ or any beast whatever which may be the property of another.⁵

§ 195. Actual malice against the owner is requisite under charge of malicious mischief by injury to animals. At common law, leaving entirely out of sight the provisions of the statutes relating to injuries to domestic animals, the offense styled "malicious mischief" has been so far ignored as to especially impose upon the complaining party the duty of alleging clearly, and fully establishing by proof, that the act complained of was the result of malice on the part of the person who committed the mischievous act against the owner of the animals injured.

The malice charged and proved, in order to obtain and sustain an indictment, must be by the wrongdoer against the owner of

¹ *State v. Briggs*, 1 Aik. 226; *Loomis v. Edgerton*, 19 Wend. 419.

² *People v. Smith*, 3 Cow. 268; *Com. v. Leach*, Ante, Sec. 194, Note 4.

³ *State v. Council*, 1 Tenn. 305.

⁴ *State v. Scott*, 2 Dev. & Batt. 35, which was an indictment for maliciously killing a steer.

In this case, the Court held that an indictment for malicious mischief may conclude at common law; and, in such indictment, it is not necessary to charge actual malice against the owner of the property injured. (*State v. Simpson*, 2 Hawks, 460.)

⁵ *Loomis v. Edgerton*, 19 Wend. 419. "Malicious mischief to any kind of property is a *misdemeanor*, and the party doing the injury may be prosecuted *criminally*."

Henderson v. The Commonwealth, 8 Grattan, 708. "Though the mere breaking and entering the close of another is not a misdemeanor, yet, if the entry be attended by circumstances constituting a breach of the peace, it will become a misdemeanor for which an indictment will lie.

"The going upon the porch of another man's house, armed, and from thence shooting and killing a dog, belonging to the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house, is a misdemeanor for which an indictment will lie."

the animals, and not merely the sudden temper which a man may feel toward the animal. It is to be regarded as property, malice against which cannot well be conceived; and hence, injuries to animals, following the general rule, to constitute an indictable offense, must be characterized by malice to the owner; and such malice will not be presumed alone from the commission of an injurious act, such as maiming or killing the animal, although proof of that act may be received as evidence of malice.¹ A late decision appears to attack this position, and to take the ground that malice may be presumed from the act of injuring another's property, and that, the injury being proved, defendant must prove absence of malice; but the case stands so far isolated as to be of greater value because of the discussion which it has given rise to, than as absolute authority.²

¹ *Henderson v. Commonwealth*, 8 Gratt. 708.

² *State v. Wheeler*, 3 Vt. 347. This was an information by the State; attorney alleging "that Daniel Wheeler, of etc., on etc., one two-year-old steer, of a red color, of the value of twenty dollars, of the goods and chattels of one Ebenezer Davis, etc., in a certain field belonging to one Simeon Morse, of etc., with force and arms, feloniously and willfully, maliciously, mischievously, and wickedly, then and there did kill," it was held that a mere invasion of private property, without a disturbance of the peace, is not an indictable offense, but is a private injury only, for which an action of trespass lies; that an indictment will not be sustained for feloniously, maliciously, mischievously, and wickedly killing a beast, the property of another; and after conviction on such an indictment, the judgment should be arrested.

State v. Newby, 64 N. C. 23. To constitute malicious mischief, at common law, in injuries to property, malice toward the owner is essential. Such malice will not be inferred from a merely injurious act, such as killing the animal of another.

To kill an animal is not necessarily an offense, but is only rendered one by the special circumstances. (*Northcot v. State*, 43 Ala. 330; *Hill v. State*, Id. 335.)

"The 9 Geo. I, Chap. 22, commonly called the Black Act, declares that if any person or persons, whether, etc., shall unlawfully and maliciously kill, maim, or wound any cattle, every person so offending, being lawfully convicted thereof, shall be adjudged guilty of felony, without benefit of clergy, etc. It was the settled construction of that statute that, in order to bring an offender within its provisions, malice must be directed against the owner of the cattle, and not merely against the animal itself." (2 *East's Crown L.* 1072-4; *The State v. Pierce*, 7 Ala. 730, *Collier, C. J., arguendo.*)

"What constitutes malicious injury to property, whether at common law or under the statutes, has been the subject of many decisions. In *Reg. v. Welch*, L. J. R. (N. S.) 753, the prisoner, by a reckless and cruel act, caused the death of a mare. The jury found that he did not intend to maim, wound, or kill the animal; but he knew that what he did would or might kill, wound, or maim her, and that he nevertheless did the act recklessly, and not caring whether the mare was injured or not. Held, that there was sufficient malice to support a conviction. There was no evidence to show that the prisoner was actuated by any ill

§ 196. Statutes making it a crime to maliciously injure domestic animals.—The common law is not, by any means, the sole reliance of the people of the United States as a protection against, and a means of punishment for, this species of crime: the peculiar annoyances liable to be suffered from the inroads of domestic animals, the facility and comparative safety from detection with which an injury committed by them may be avenged upon the beasts, the ready means at hand to visit malice against the owner of the animals by injury to his stock, have been found to be sources of temptation to crime, of such a character as to demand special legislative enactment upon the subject; so that, in addition to the common-law remedies and provisions against crime of this nature, the several States have guarded against it by statute laws upon their respective criminal codes, providing punishments more or less severe, as the exigencies of States, the character and business pursuits of the people, or the importance of the subject, appeared to require.

§ 197. State laws as to malicious injury to animals.—The penal code of Alabama provides that “any person who unlawfully and maliciously kills, disables, disfigures, destroys, or injures any animal, the property of another, must, on conviction, be fined not less than twenty nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months.”

will toward the owner of the animal, nor by any spite toward the animal herself, nor by any motive except the gratification of his depraved tastes. The statutes relating to malicious injury to property in England and Ireland have been consolidated in the Act of 24 and 25 Vic. Chap. 97. The American statutes vary somewhat in terms, but are, in the main, based on the English statutes. The common-law doctrine was that the malice must be against the owner of the property, and it was not sufficient that there should be ill mind toward the animal itself. (*Rex v. Pearce*, 1 Leach, [4th Ed.] 527; 2 East's P. C. 1072.) Bishop remarks that ‘where the indictment is at common law, the American doctrine appears to be that there must be a particular malice against the owner; but where the indictment is drawn on a statute, the question depends partly on the particular language of the statute, and partly on the differing views of the different judges.’ (Bishop on Stat. Crimes, Sec. 435.) The case of *Reg. v. Welch*, *Supra*, seems to carry the doctrine of malice in injury to property to the utmost extent. According to *Reg. v. Welch*, where an act is reckless and cruel, and likely to result in injury, it is malicious, without intent to kill, maim, or wound.” (A. L. J. Feb. 26th, 1876, pp. 140-1.)

Under the statute, it has been held to be incumbent on the State to prove actual malice toward the owner of the animals, on the part of the offender.¹

In California, the law is such that poisoning animals, the property of another, or maliciously exposing any poisonous substance with the intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the State prison not exceeding three years, or in the county jail not exceeding one year, and a fine not exceeding \$500. And every person who maliciously kills, maims, or wounds an animal, the property of another, is guilty of a misdemeanor.²

§ 198. Laws in Georgia as to malicious injury to animals.—In the State of Georgia, the statute law is such that if any person shall maliciously maim or kill any horse, mule, bull, steer, ox, cow, calf, heifer, or shall maliciously kill a hog or hogs, such person shall, upon conviction, be punished by a fine not to exceed \$1,000; imprisonment not to exceed six months; to work in a chain-gang upon the public works not to exceed twelve months: and any one or more of these punishments may be ordered, in the discretion of the judge. "Provided, that when the person killing or maiming such animal or animals shall, upon the trial therefor, set up as a defense that such killing or maiming had been done, not from malice toward the owner of said animal or animals, but to prevent injury to defendant's growing

¹ Sec. 3733, Revised Code of Alabama; Penal Code, Sec. 186. The real essence of this offense is malice toward the owner of the animal injured. (*Northcot v. The State*, 43 Ala. 330; *Hill v. The State*, 43 Ala. 335; *State v. Pierce*, 7 Ala. 728.) There is, however, an apparent contradiction in the decisions. In *Johnson v. The State*, 27 Ala. 459, Walker, C. J., in delivering the opinion, said: "Under the statute now under consideration, the willful performance of the specified acts, as well as the malicious performance of them, constitutes the offense. It was, therefore, proper for the Court to charge the jury that proof of malice toward the mule or its owner was not indispensable."

A later decision, *Hobson v. The State*, 44 Ala. June term, 1870; indictment for killing a hog. Defendant prayed an instruction, to the effect that it is incumbent to prove that the defendant killed or wounded the animal both unlawfully and maliciously; and unless the jury are satisfied beyond a reasonable doubt that the defendant had malice against the owner of the hog, they must acquit. The instruction was refused, and the case went up on appeal on this point. Held, that the refusal to grant the instruction was error; that malice toward the owner is an essential ingredient of the offense of malicious injury to animals.

² Penal Code of California, Secs. 596-7.

or matured crops, or other property, such defense shall not avail to acquit the defendant, unless it shall be made clearly to appear, before the Court trying the same, that such growing or matured crops, or other property, was protected by a substantial fence, not less than four and a half feet high."¹

§ 199. Statutes concerning malicious injury to animals.

—In Illinois, by statute provision, every person who shall unlawfully, wantonly, willfully, or maliciously kill, wound, disfigure, or destroy any horse, dog, or other useful or domestic animal, the property of another, on conviction shall be fined not exceeding one hundred dollars, or imprisoned not exceeding three months, or both.²

Under this statute, it has been held that a party may be convicted of malicious mischief in wounding an animal while trespassing in his field; that the fact that the animal was doing damage does not justify wounding or injuring it.³

In Iowa, the statute provides that if any person maliciously kill, maim, or disfigure "any domestic beast of another," or maliciously poisons any such animal, or exposes any poisonous substance with the intent that the same shall be taken by them, he shall be punished by imprisonment in the county jail not

¹ Code of Georgia, 1873, by Irwin, Lester, and Hill, Secs. 4310 and 4612. Upon these statutory provisions, it has been held, in Georgia, that to constitute malicious mischief it is not necessary to prove actual ill-will or resentment against the owner of the animals. "If the act be done wantonly and recklessly, or under circumstances which bespeak a mind prompt and disposed to the commission of mischief, it is sufficient." (*Mosely v. The State*, 28 Ga. 190.)

Where a party was on trial for shooting a mule, he was permitted to rebut the presumption of malice by showing that he killed the animal to protect his crop—it appearing that the mule was in defendant's corn-field; that he was a mischievous animal, and was hard to restrain from trespassing. (*Wright v. The State*, 30 Ga. 325.)

² Illinois Criminal Code, p. 81, Sec. 269.

³ *Snap v. The People*, 19 Ill. 80. A mare was trespassing in a field of oats, protected by a sufficient fence; the owner of the field directed his hired man to shoot her, which he did—in the flank, with fine shot—thereby injuring the animal temporarily; the master and servant were indicted, and convicted. On appeal, the judgment was affirmed.

Caton, C. J., in delivering the opinion of the Court, said: "It is a violation of the common law, as well as of the statute, for a person to shoot or wound stock found trespassing on his premises. He may expel them, and use the necessary force for that purpose, doing them no unnecessary damage; or he may take them up, *damage feasant*; but the law of right, as well as of humanity, forbids him to inflict an unnecessary injury upon the brute."

exceeding one year, or by fine not exceeding three hundred dollars.¹

§ 200. State laws as to injury of domestic animals.—

In Kansas, the provisions of the statute law are such that any person who shall maliciously wound, maim, or poison the domestic animal of another, shall, on conviction, be punished by confinement and hard labor not exceeding three years, or imprisonment in the county jail *not less* than twelve months.²

In Kentucky, there is a statute law providing that, "if any person shall willfully kill, disfigure, or maim any horse, cow, mule, jack, or jennet, not his own, without the consent of the owner, he shall be fined not less than ten nor more than one hundred dollars, or be imprisoned not less than one nor more than six months."³

By the criminal statute of Louisiana, whoever shall wantonly or maliciously kill any domestic animal, the property of another, shall be fined in a sum not exceeding two hundred dollars, or be imprisoned not exceeding six months, and shall pay to the owner of the animal killed the value thereof; whoever shall, wantonly or maliciously, cruelly beat, maim, or disable such animal, shall be fined not exceeding one hundred dollars, or be imprisoned not exceeding one month, and shall pay to the owner any damage he may sustain in consequence thereof.⁴

In Maine, there is a statute law as follows: "Whoever willfully or maliciously kills, wounds, maims, disfigures, or poisons any domestic animal, or exposes any poisonous substance with intent that the life of any such animal should be destroyed thereby, shall be punished by imprisonment not more than four years, or by fine not exceeding five hundred dollars."⁵

§ 201. Malicious injury of animals—Criminal laws.

—The Maryland statute is to the effect that if any one willfully and maliciously kill, wound, or maim a domestic animal

¹ Laws of Iowa, Revision of 1860, p. 739, Sec. 4318.

² Genl. Statutes of Kansas, 1868, p. 337, Secs. 101, 102.

³ Revised Statutes of Kentucky, Staunton, Vol. 1, 411, Sec. 8.

⁴ Revised Statutes of Louisiana, 1870, p. 163, Secs. 815, 816.

⁵ Revised Statutes of Maine, 1871, p. 861, Sec. 1. This section might, in strict construction, prevent the owner from killing his own animals.

not his own, "and not in the act of trespassing upon his inclosures, he shall undergo a confinement in the penitentiary for not less than eighteen months, or more than four years."¹

In Massachusetts, the criminal statute is that "whoever willfully or maliciously kills, maims, or disfigures any horses, cattle, or other beasts of another person, or willfully and maliciously administers poison to any such beasts, or exposes any poisonous substance with intent that the same shall be taken or swallowed by them, shall be punished by imprisonment in the State prison not exceeding five years, or by a fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year."²

It has been held, in this State, that the charge under the statute cannot be sustained, unless it be alleged and proved, to the satisfaction of the jury, that the injury was committed not only wantonly, but with malice to the owner.³

A construction of these statutes, as late as 1871, extends their operation from horses, cows, and the other *quadruped* animals which, from usage, have come to be known as "domestic" animals, to poultry; so that the penalties imposed by the statute are held to apply to persons convicted of having poisoned hens which did not belong to them.⁴

¹ Maryland Code, Public General Laws, Vol. 1, p. 215, Sec. 39.

² Genl. Statutes Mass. p. 806, Sec. 80. An indictment which charges the defendant, in the words of the statute, with willfully and maliciously administering a certain poison to the horse of another person, is sufficient, without further averment of any criminal intent, or of any injury to the horse. (*Commonwealth v. Brooks*, 9 Gray, 249; *Same v. Sowle*, *Ibid*, 304.)

It is an indictable offense at common law to maliciously and willfully poison a cow, the property of another. (*Commonwealth v. Leach*, 1 Mass. 54.)

³ *Commonwealth v. Walden*, 3 Cush. 558. "The word 'maliciously,' relating to malicious mischief, is not sufficiently defined as 'the willfully doing of any act prohibited by law, and for which the defendant had no lawful excuse.'"

This was an indictment under a former statute, similar to the one now in force and given in the text, for shooting a mare. The judge in the Court below charged the jury as above, and on appeal, this charge was held error. The opinion of the higher Court was, that "the jury should have been instructed that, to authorize them to find the defendant guilty, they must be satisfied that the injury was done either out of a spirit of wanton cruelty, or wicked revenge." Malicious mischief, amounting to a crime, is so defined by Blackstone, (4 Bl. Com. 244) and in the standard works generally.

⁴ *Commonwealth v. Mary E. Falvey*, 108 Mass. 304. The lady's patience became exhausted, and deeming herself justified by the annoyance caused by her neighbor's poultry, she poisoned them; was indicted, tried, and convicted there-

§ 202. Laws of several States as to injury of domestic animals.—In Michigan, the crime of maliciously and willfully poisoning, maiming, or killing horses, cattle, or other beasts of another, is by statute punishable by imprisonment in the State prison not more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than one year.¹

The statute in Minnesota provides that whoever willfully and maliciously kills, maims, or wounds any domestic animals which do not belong to him, shall, on conviction, be punished by imprisonment not more than two years or less than three months, or by fine not more than five hundred or less than fifty dollars.²

In Mississippi, by statute, it is provided that whoever shall maliciously, or out of a spirit of revenge or wanton cruelty, kill, maim, or wound any horse, etc., shall be fined not less than twenty-five or more than three hundred dollars, or be imprisoned not less than three or more than six months; and if any person shall cut off or shave the tail of any horse, mare, gelding, or colt, not his own, he shall be liable to the same penalty.³

In Missouri, the criminal statute provides that every person who shall willfully kill, poison, maim, or wound any cattle of another, shall be punished, on conviction, by imprisonment not less than six months or more than three years, or fine not less than two hundred and fifty dollars; or by fine not less than one hundred dollars, and imprisonment in the county jail not less than three months.⁴

for, under the statute cited. On appeal from the judgment of conviction, the rulings of the lower Court, on which the conviction was had, were sustained.

The Supreme Judicial Court of Massachusetts say: "The construction contended for by the defendant would require us to hold that the statute legalizes the use of poison for the willful and malicious destruction of any personal property of another, not included under the description of 'horses, cattle, or other beasts.' It is impossible to believe that such could have been the purpose of the statutes."

¹ Compiled Laws Michigan, Vol. 2, p. 2088, Sec. 7596.

² Statutes at Large of Minnesota, 1873, p. 1000, Sec. 108. By a recent decision (*Judson v. Reardon*, 16 Minn. 431 et seq.) a definition of malice is given, apparently in conflict with *Commonwealth v. Walden*, 3 Cush. 558.

Here it is held that, "from the willful doing of an injurious act, without lawful excuse, the law implies malice, and this, though the defendant supposed he was acting in conformity to law."

³ Statute Laws of Mississippi; *Howard v. Hutchinson*, p. 673, Sec. 44.

⁴ Statutes of Missouri, 1870, (Wagner) p. 462, Secs. 54, 55. Strictly, this stat-

The New Jersey criminal statute makes the willful or malicious killing of any domestic animal a crime, punishable by fine not exceeding one hundred and fifty dollars, or imprisonment at hard labor not exceeding two years, or both.¹

The statutes of New York make a misdemeanor of the malicious killing or maiming of any animal, the property of another, and visit with heavy penalties the crime of poisoning animals, the property of another, to wit: imprisonment in the State prison for a term of not more than three years, or in a county jail for not more than one year, or by a fine of not more than two hundred and fifty dollars, or by both fine and imprisonment.²

§ 203. Criminal law as to malicious injury to animals.

—In Pennsylvania, it is provided, by statute, that he who shall willfully kill, maim, or disfigure, or administer poison to any domestic animal, not his own, shall be guilty of a misdemeanor, and be punished by fine not exceeding five hundred dollars, or imprisonment not more than three years.³

In North Carolina, such malicious mischief is made a misdemeanor, and punished accordingly.⁴

In Ohio, the value of the animal is made a standard as to the gravity of the offense; to willfully kill an animal, the property of another, is by statute made a misdemeanor; if the animal's value is as much as thirty-five dollars, the penalty is imprisonment not more than three years nor less than one; if the beast is worth less than thirty-five dollars, then the penalty imposed is a fine of not more than two hundred or less than five, or imprisonment not exceeding three months, or both fine and imprisonment.

But an exception from the operation of the statute is made in the case where the animals are trespassing on the inclosure of the person who kills or maims them; or where the injury to the beasts is to prevent them from trespassing.⁵

ute applies to "cattle" alone, but the term would probably be construed to include all domestic animals. (*Commonwealth v. Falvey*, 108 Mass. 304.)

¹ *Nixon's Digest Laws of New Jersey*, p. 205, Sec. 70.

² *Penal Code of New York*, p. 259, Secs. 698, 699.

³ *Purden's Digest*, by Brightly, p. 242, Sec. 163.

⁴ *Revised Code of North Carolina*, p. 223, Sec. 104.

⁵ *Revised Stats. of Ohio*, Swan & Critchfield, Vol. 1, p. 74, Secs. 23-25.

In the statute law of Tennessee, to willfully and maliciously kill, maim, or poison a domestic animal, worth less than ten dollars, the property of another, is made punishable by a fine, and imprisonment in the county jail not exceeding three months, and payment to the owner of the value of the animal; such offense against an animal worth more than ten dollars, is punishable by imprisonment in the penitentiary not less than one nor more than five years, and the owner of the beast shall also have awarded to him its value, and such award the culprit must pay.¹

§ 204. Statutes as to malicious injury to animals.—

Texas statute law makes it a crime to willfully kill, maim, disfigure, or poison a domestic animal owned by another person, and makes the offense punishable by fine, not less than thrice or more than ten times the amount of injury done.²

In Vermont, the statute provides that every person who shall maliciously and willfully maim, disfigure, poison, or kill any domestic animal, which does not belong to him, shall be punished by imprisonment in the State prison not more than five years, or by fine not exceeding five hundred dollars, or by both fine and imprisonment.³

In Wisconsin, this offense is, by the statute as to crimes, made punishable by imprisonment not less than three months nor more than two years, or by fine not less than fifty nor more than five hundred dollars; provided, that the property being less than three dollars in value, the punishment shall be a fine of not less than five nor more than fifteen dollars.⁴

¹ Stats. of Tennessee, Compilation by Thompson & Steger, Vol. 3, p. 61, Secs. 4657, 4658. How much he may be fined, when the beast is worth less than ten dollars, the statute does not specify; and in all of these statutes, where the value of the animal is made the standard of punishment, there is an apparent injustice; the malice of the wrong-doer, the injury to the peace and dignity of the commonwealth, are as great when the animal is worth nine dollars as when its value is ten; in one case the culprit may be punished by imprisonment not exceeding three months; in the other, he may be incarcerated five years.

In this State it has been held that malice against the owner of the animal must be charged and proved. (*State v. Wilcox*, 3 Yerg. 278.)

² Laws of Texas, Paschal's Digest, p. 460, Sec. 2344. Among the domestic animals enumerated is the dog, which is not generally regarded as among the domestic animals for a malicious injury to which a criminal action, under similar statutes, will lie.

³ General Statutes of Vermont, p. 671, Sec. 26.

⁴ Statutes of Wisconsin, Taylor, p. 1850, Sec. 53.

§ 205. **Construction of statutes for prevention of willful injury of animals.**—Rules to be deduced from the decisions upon these statutes by the Courts of the several States are of but little general value, from the diversity presented by the laws as to the character and enormity of the offense, and the measure and mode of punishment provided. It is, however, to be deduced that the essence of the offense of malicious mischief, in injuring animals, is malice toward the owner.

To constitute malicious mischief, at common law, in injuring animals, malice toward the owner is essential. Such malice must be averred and proved. It will not be inferred from a merely injurious act, such as killing the animal of another.

To kill an animal is not necessarily an offense, but is only rendered one by the special circumstances.

This general rule has been generally adopted in the several States as the true one, in construing these statutes.¹

¹ *Commonwealth v. Brooks*, 9 Gray, 303; *The King v. Pearce*, 1 Leach, 4th Ed. 527, and 2 East, P. C. 1072; *Commonwealth v. Sowle*, 9 Gray, 304. But an indictment need not set out the precise means used to commit the injury. (*Rex v. Whitney*, 1 Moody, 3; *Rex v. Briggs*, 1 Moody, 318; *Commonwealth v. Smith*, 2 Allen, 516.)

State v. Newby, 64 N. H. 24. An ox was killed in winter, when, the ground being covered with snow, and no possible injury to crops could have been the motive causing his death, it was insisted that malice must be presumed. The Court did not so regard it, and decided that, "in the spoliation or destruction of property, malice toward the owner must be the inducement, in order to constitute the crime of malicious mischief at the common law.

"This was not controverted by the attorney-general, but he insisted that the fact of the killing the ox being found, malice must be inferred, just as in homicide. The difference is that homicide is a crime, *per se*, and excuse or justification must come from the defense, or appear in the cause; but to kill an ox is not so, and, therefore, malice toward the owner must be found. It was not found in this case, and the defendant was entitled to an acquittal."

State v. Jackson, 12 Ire. 329; *State v. Latham*, 13 Ire. 33; *Northcote v. State*, 43 Ala. 334. "Malice is the *gravamen* of this offense, and it must be malice to the owner. If the injury was inflicted without any malice to the owner, it is a mere trespass, and not malicious mischief." (*Johnson v. State*, 37 Ala. 457; *Pierce v. State*, 7 Ala. 728.)

The converse of this proposition is held in *Wallace v. The State*, (30 Tex. 758) in which it was held that it was not necessary to prove malice on the part of the accused; that it was enough to show that the act was willfully done; that, "in contemplation of the penal law, the *willful killing* of the hogs, with this intent, *was the gravamen* of the charge, and in that act the offense was complete against society." (P. 759.)

An examination of the law of Texas, however, shows that statute to differ materially from those of the other States. The language of this act is that he who shall *willfully* maim, kill, etc.; the language, generally, of the statutes is *willfully and maliciously*.

§ 206. The definition of malice, at criminal law, is the doing a wrongful act intentionally, without just cause or excuse;¹ but, in this class of action, the general definition does not strictly apply. The word "malicious" is not, in prosecutions for malicious mischief, sufficiently defined as the willful doing of any act prohibited by law, and for which the defendant has no lawful excuse. In order to convict, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty, or of wicked revenge.² But the proof of malice being necessarily from circumstantial evidence—for the human heart is open to no *man*—it is the province of the jury to regard all the circumstances, and from them deduce whether or not the injury was done to the animal out of malice to the owner.

In doing so, they may regard previous threats, old grudges, or circumstances denoting ill will to him whose animals have been injured; and malice may be inferred where the conduct of the accused, in injuring the beasts, will admit of no other interpretation than that he acted out of spite to the owner.³

§ 207. As to what constitutes injury to animals, under the statutes against malicious injuries, much ingenuity has been manifested by those who would wreak their spite against the owner upon his unoffending beasts. The most common has been to cut off the manes or shave the tails of horses, and then, if detected, to take shelter under the proposition that such an act does not injure the animal; that such is not an injury; that it can at most be harmful only to the taste, conception of beauty, or feelings of the owner or others. But the Courts have not permitted that evasion of the law, and have held that the disfigurement of animals, so that their value as merchandise is diminished, is within the statutes "to provide for the punishment of the crime of maliciously killing and injuring horses and other animals."⁴

¹ Maynard v. F. F. Ins. Co. 34 Cal. 48; Bouvier's Law Dic. Vol. 1, 91.

² Bouv. Law Dic. Vol. 1, p. 92, "Malicious Mischief"; Jacob's Law Dic. "Mischief, Malicious"; Allison Scotch Law, 448.

³ Ph. on Ev. marginal page 572.

⁴ Oviatt v. The State, 19 Ohio St. R. 576; Boyd v. The State, 2 Humph. 33.

CHAPTER XIX.

FENCES.

- § 208. The use of fences to protect crops.
- § 209. Common-law rule: he who keeps cattle must fence.
- § 210. The value of this rule in the United States.
- § 211. In some of the States this rule never obtained.
- § 212. The common law, how far adopted in America.
- § 213. No general rule as to fencing in the United States.
- § 214. Statutes of several of the States as to fencing.
- § 215. State laws as to fencing against stock.
- § 216. Prescription to fence at common law.

§ 208. The use of fences to protect crops.—In natural sequence to consideration of the laws which control, and legal principles which apply to, the business of raising and keeping domestic animals, comes an examination of the laws in relation to fences, to determine the relative position of the parties who keep live-stock, and those who raise crops.

While fences have a manifest value as boundaries and landmarks, it is clear that the chief function of that important feature of the farm is to protect crops from the ravages of domestic animals.

From the circumstance that the business of agriculture is necessarily carried on in the same vicinity with that of keeping live-stock, it has resulted that much litigation has been had between the parties engaged in these two callings, because of the propensity of animals to trespass upon crops; and special legislation has been frequently resorted to for the purpose of establishing and maintaining in due legal relation these two lines of business, and to harmonize the rights of the farmer to raise crops, and the stock-raiser to keep animals.

§ 209. Common-law rule: one who keeps cattle must fence them in; he who raises crops need not fence them out.—The use of fences, under the rule of the common law, is to

keep the owner's cattle in, rather than for the farmer to keep out of his inclosure the cattle which belong to other persons; it is a general rule of the common law that the owner of cattle is bound, at his peril, to keep them off the land of others, and he cannot justify a trespass which his animals have committed, by showing that the land was not fenced; the owner of animals must fence them in, and he who tills the soil need not fence them out.

Under the common-law, the owner of cattle, if not absolutely obliged to fence his land, was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping; the legal obligation of the occupants of adjoining lands to make and maintain partition fences, where no prescription exists and no agreement has been made, rests entirely on provisions by statute.¹

§ 210. The value of the common-law rule in the United States, even where the respective statute laws are silent upon the topic, has not been conceded universally, or without controversy so earnest as to leave serious doubts upon the subject. In the leading case of *Rust v. Low*, (Ante) it was urged, in argument, that the condition of things in the colonies was so different from that in the mother country that the rule

¹ 3 Kent's Com. Sec. 438; *Thayer v. Arnold et al.* 2 Metc. 589; *Miner v. Deland*, 18 Pick. 266; *Lyman v. Gipson*, Ibid, 422; *Wells v. Howell*, 19 Johns. 384; *Sturtevant v. Merrill*, 33 Maine, 62; *Webber v. Classon*, 35 Maine, 26; *Bradbury v. Gilford*, 53 Maine, 99; *Lyon v. Myrick*, 105 Mass. 75; *Richardson v. Wilburn*, 11 Md. 340; *Tonawanda R. R. Co. v. Munzer*, 5 Denio, 259. "Every unwarrantable entry, by a person or his cattle, on the land of another, is a trespass, whether the land be inclosed or not. It is a general rule of the common law that the owner of cattle is bound, at his peril, to keep them off the lands of other persons, and he cannot justify or excuse such an entry by showing that the land was unfenced. Fences were designed to keep one's cattle at home, and not to guard against the intrusion of those belonging to other persons.

There may be exceptions to the rule stated, growing out of a necessity, all but irresistible, in particular exigencies; as where cattle driven along a highway stray from it, in sight of the person in charge of them, and pass, against his will, on to uninclosed ground adjoining the highway, he making fresh suit to bring them back; for, in such case, the owner ought not to be chargeable for this involuntary trespass on the land, nor for the herbage the cattle may crop."

This case fairly presents the general rule, and it is perfectly well settled and understood that the owner of the beasts must fence them in, and is responsible for trespasses by his animals committed on the lands of another, whether such lands are fenced or not. (*Rust v. Low*, 6 Mass. 94; *Little v. Lathrop*, 5 Greenl. 356; *Bush v. Brainard*, 1 Cow. 78; *Holladay v. Marsh*, 3 Wend. 142.)

should not apply; that, in England, the lands have generally been so long inclosed as, by prescription, to furnish a mitigation of the rule which could not occur in a new country; that the necessity of protecting growing crops from the depredations of wild animals required the cultivated lands to be inclosed by fences, and the very small proportion of the lands which were devoted to agricultural pursuits made it more fair that the cultivator of the soil should protect his crop, than that he who kept stock should be forced to do so.¹ The Court, however, refused to entertain this view, and held that the common-law rule applied. In *Lord v. Wormwood*, 29 Me. 282, these views were presented ably in argument; but the Court felt bound to follow *Rust v. Low*, and decided in the same way, sustaining the common-law rule that the owner of live-stock must fence his animals in.

§ 211. In some of the States, this rule never took effect.—In some of the United States, it has been successfully contended that this common-law rule does not, and never did, apply to them; that the American common law, founded upon decisions recognizing the customs which had resulted from a condition of things radically different from those which existed in the mother country, had established a converse of the rule that the owner of domestic animals must fence them in; that the common law of England was only adopted so far as it was applicable to the new State, and that this rule was not applicable, because it was based upon the condition of the country England, which differed so greatly from that in America as to

¹ This reasoning not only appears sound, but was recognized as correct by colonial enactments as early as 1642, when it was ordained that no man should be liable to satisfy for damage done by his animals in any grounds not sufficiently fenced. (Genl. Laws and Liberties of the Mass. Colony, p. 20.) And, in 1662, it was enacted that where any cattle should trespass on any property not sufficiently fenced, in the opinion of the fence-viewers, the owner of the land should suffer the loss. There appears upon these ordinances to have grown up a usage or common law of the colony, which was, to some extent, recognized by the provincial acts of 5 W. & M. Chap. 11, and 10 W. III, Chap. 4, and also by the statute of the Commonwealth, 1788, Chap. 63, Sec. 3. By these ordinances and statutes, it was enacted that any person injured in his mowing, tillage, or other lands under improvement that are inclosed by a lawful fence, may have an action for trespass. The inference is natural that, not having his land so inclosed, he could not have his action. But the Court ruled otherwise, and insisted on a rigid application of the original common-law rule, and held that the colonial ordinances were repealed by the adoption, by the State of Massachusetts, of the common law.

render it inapplicable; that as far back in the past as the rule itself can be traced, land in England was inclosed wherever cultivated; that inclosed tracts, or fields, were the rule, and open lands the exception, and prescription gave such universal exception to the rule as to be a rule by itself; while in America, the opposite condition of things existed; the country was a wilderness, small patches of which were reclaimed, and put into cultivation, for which protection from wild animals was often necessary; and, from the beginning of a settlement, it was a recognized necessity that he who cultivated lands must protect his crops from trespass by proper fences.¹

¹ *Kerwhacker v. C. C. & C. R. R.* 3 Ohio St. 179. The Court held that the common-law rule never obtained, saying: "The common understanding upon which the people of this State have acted, since its first settlement, has been that the owner of land was obliged to inclose it, with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for trespass thereon by the cattle of his neighbor, running at large, and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this common-law rule inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, and understanding of the people."

Studwell v. Rich, 14 Conn. 295, decides, also, that the common-law rule, that he who keeps animals must guard them from trespassing upon the lands of other persons, whether such lands are inclosed by fences or not, never applied to Connecticut.

Barnham v. Van Dusan, 16 Conn. 200; *Commerford v. Duprez*, 17 Cal. 308; *Waters v. Moss*, 12 Cal. 535; *Logan v. Gedney*, 38 Cal. 581. "The rule of the common law of England, that every man is bound to keep his beasts within his own close, under the penalty of answering in damages for all injuries resulting from their being permitted to range at large, never was the law in California."

In Iowa, the decisions are to the same effect, and thereby it is now established that the common-law rule is not the law in that State; that where there exists no relation between the parties, by which they are bound to maintain division fences, the cultivator of the soil must fence his land against stock. (*Henry v. Dubuque*, 2 Iowa, 288; *Kennedy v. Same*, *Ibid*, 521; *Herrold v. Myers*, 20 Iowa, 378.)

In Kansas, the rule is not in force. "The act in relation to fences, passed in 1868, declares what shall constitute a legal and sufficient fence, and requires all fields and inclosures to be inclosed therewith; and said act so far modifies the common law that no action will lie for injuries done on real estate by trespassing cattle, unless such real estate is inclosed with a sufficient fence." (*Darling v. Rogers*, 7 Kansas, 592.)

In Pennsylvania, the decisions are that the common-law rule never obtained in that State, or that, if it ever did at all, it was abrogated by Statute of 1795. (*Purden's Digest*, by Brightly, 1700-1870, p. 475.)

Adams v. McKinney, *Addison*, 258. "In England, the law is to fence round every man's ground, and trespass may be maintained for passing over the uninclosed ground of another against his will. There, as has been stated, the prin-

§ 212. The common law, how far adopted in America.

—The common law is the basis of our jurisprudence only so far as it is applicable to the condition of society in the State by which it is adopted; and the general understanding of how far its adoption binds the State to its provisions is that circumstances affecting the new country, when they are of a general character, qualify the common law to the extent even of discarding its provisions, when they come in direct conflict with the manifest necessities of the people, at the time of its adoption.

If it be conceded that where an American common law has obtained by decisions in the Courts of last resort in the several United States, it should furnish appropriate rules; that the common law of England is only in force so far as it is in harmony with the institutions, customs of the people, and principles which characterize the laws of the respective States; and that the rule, as established by the American cases, ought to govern where there have been decisions in the Courts of the several States adverse to those of the English Courts—still, it remains difficult, from the American cases, to deduce an invariable rule as to the applicability of this common-law rule, that the owner of animals must keep them inclosed.

There is not only a lack of harmony among the Courts of all the States upon the proposition, but in the instance of one, at least, the decisions of the Courts of last resort in the same State are at variance one with another.¹ In some of the States,

ciple *sic utere tuo ut alienis non laedas*, every man must take care to keep his cattle from going on the lands of another. In this country, our circumstances have led us to suppose that every man must take care of his land, that the cattle of others go not on it." (*Milligan v. Wehinger*, 68 Penn. St. 35.)

In *Powell v. Sims*, 5 West Virginia, 1, it was held that the common law of England is in force in that State only so far as it is in harmony with its institutions, and its principles are applicable to the state of the country and the condition of society; and that the rule, as established by the American cases, ought to govern where there have been decisions in the Courts of the several States, adverse to those of the English Courts.

¹ In Illinois, there appears to be some conflict of decisions as to the applicability of the common-law rule. In the earlier cases, it was held that this rule of the common law, requiring the owner of hogs, cattle, etc., to keep them upon his own land by sufficient fences, had never been in force in Illinois, and that, in order to maintain trespass for injuries to crops by animals on one's close, the owner of the close must have it surrounded by a good and sufficient fence. *Seely v. Peters*, 5 Gilm. 130; *Misner v. Lighthall*, 13 Ill. 609; *Header v. Rust*, 39 Ill. 186; *Stoner v. Stoner*, 45 Ill. 76; *McCormick v. Tate*, 20 Ill. 334: C. B. & Q. R.

as above seen, it is held that the common-law rule was never in force, was antagonistic in principle to the established usages, and generally inapplicable; that statute enactments, imposing responsibility and providing penalties to be imposed upon the owners of animals which trespass upon lands protected by legal fences, necessarily put upon the tiller of the soil the duty of fencing his lands, before he could either prosecute, or, in civil action, recover damages against the owner of trespassing animals. On the other hand, the Courts of other States have decided these statutory provisions to be declaratory only of the common-law rule, giving cumulative remedies, and that, however full is the remedy given by the statute law for trespasses by animals, the owner of the land trespassed upon, or of the crop injured by them, is not obliged to rely on the laws of the State, but may also look to his common-law remedy, under the rule that he who keeps stock must answer for their trespasses on the lands of another, whether such lands are or are not inclosed by lawful fences.¹

R. Co. v. Cauffman, 38 Ill. 429; *Seely v. Peters*, 5 Gilm. 130, were cited approvingly, and it was held that the common-law rule, which required individuals to fence in their cattle, had never obtained in that State; that "to maintain trespass for damage done by stock, the owner of the close must have it surrounded by a good and sufficient fence."

But, in *McBride v. Lynd*, 55 Ill. 441, which was an action of damages for trespass by hogs which got into plaintiff's field through a defective fence, it was held that "the fence dividing the fields was not a partition fence under the statute. Hence, the condition or sufficiency of the fence is not involved. Under such circumstances, appellant was bound to secure his hogs, in his own field, at his peril. The rule of the common law prevails in such cases, that each man is bound to take care of and keep his cattle on his own land."

¹ "At common law, a man was not bound to fence his lands against stock; but the owner of beasts was obliged to restrain them at his peril. Our statutes in relation to division fences have, in some respects, restricted this liability; but they do not deprive the owner of lands of an action of trespass for injuries done by cattle. He is not confined to the remedy of appraisal by fence-viewers, provided by statute." (*Holladay v. Marsh*, 3 Wend. 142; *Stafford v. Ingersol*, 3 Hill, 38; *Wells v. Howell*, 19 Johns. 385; *Ryan v. R. & S. R. Co.* 9 How. Pr. R. 453.)

"Cattle, by nature, are wont to stray abroad. By the common law, the owner of them is bound to keep them from straying into the possession of others. If he fails to do so, and they do damage in thus straying, the injury is his trespass. The statutes in respect to fences between occupied lands do not relieve the owners of cattle from this common-law duty." (*Keenan v. Cavanaugh*, 44 Vt. 268; and to the same point, *Rust v. Lowe*, Ante, Sec. 209; *Binney v. Hall*, 5 Pick. 503; *Thayer v. Arnold*, 4 Met. 589; *Lord v. Wormwood*, 29 Ma. 282; *Startevant v. Merrill*, 32 Me. 62; *Webber v. Clossen*, 35 Me. 26; *Perkins v. Eastern R. R. Co.*

§ 213. **No general rule as to fencing in stock.**—From the manifest impossibility of harmonizing these two propositions, that the common-law rule never was applicable, and had no force in the States where that doctrine has become *stare decisis*, and the converse, that the common-law rule is the law of the land, and the laws of the State upon the subject are but declaratory thereof, or give only cumulative remedies, as has been decided in other of the States, it results that the status of each State must be ascertained by regarding alone the rulings of its Court of last resort, where the matter has been clearly adjudicated.

§ 214. **Statutes of several of the States as to fencing.**—In the class of States where the common-law rule does not apply should be ranked California,¹ Connecticut,² Iowa,³ Kansas,⁴ Pennsylvania;⁵ in the second class, Massachusetts,⁶ Maine,⁷ Vermont.⁸

In certain of the other States, direct statutory enactments exist, which are so far antagonistic to the common-law rule as necessarily to supersede it; thus, in Alabama, the law on the statute book reads: "If any trespass or damage is done by any animal breaking into lands not inclosed by lawful fence, the owner is not liable therefor."⁹ Similar provisions appear in the statutes of Georgia,¹⁰ Indiana,¹¹ Michigan,¹² New Jersey,¹³

29 Me. 307; Knox v. Tucker, 48 Me. 373; Bradbury v. Gilford, 53 Me. 99; James v. Tibbetts, 60 Me. 557.)

¹ Commerford v. Duprey, 17 Cal. 308; Logan v. Gedney, 38 Cal. 531; Waters v. Moss, 12 Cal. 535.

² Studwell v. Rich, 14 Conn. 295; Wright v. Wright, 21 Conn. 329.

³ Henry v. Dubuque, 2 Iowa, 288; Kennedy v. Same, Ibid, 521; Herrold v. Myers, 20 Iowa, 378.

⁴ Darling v. Rogers, 7 Kansas, 592; Larkin v. Taylor, 5 Kansas, 433.

⁵ Adams v. McKinny, Addison, 258; Milligan v. Wehinger, 68 Penn. St. 235.

⁶ Rust v. Low, 6 Mass. 94; Binney v. Hull, 5 Pick. 503; Thayer v. Arnold, 4 Met. 589.

⁷ Lord v. Wormouth, 29 Me. 282; Sturtevant v. Merrill, 32 Me. 62; Webber v. Clossen, 35 Me. 26; Perkins v. E. R. R. Co. 29 Me. 307; Knox v. Tucker, 48 Me. 373; James v. Tibbetts, 60 Me. 557.

⁸ Keenan v. Cavanaugh, 44 Vermont, 268.

⁹ Revised Code of Alabama, 1867, p. 282, Secs. 1282, 1283.

¹⁰ Code of Georgia, by Irwin, Lester & Hill, 1873, p. 244.

¹¹ Stats. of Indiana, Gavin & Hord, Vol. 1, p. 342.

¹² Laws of Mich. 1861, p. 294; Compiled Laws, 1871, pp. 300, 301.

¹³ Laws of New Jersey, Nixon's Dig. 4th Ed. p. 333, Sec. 10.

Texas,¹ and Tennessee.² In Minnesota, the statute law is peculiar; a lawful fence is defined, and a provision is made that "no damage shall be recovered by the owner of any lands for damage committed thereon by any beasts during the day-time, unless it shall be proven that the lands were protected, on the side where the breach or entry was made, by a lawful fence; but for all damage done in the night-time he may distrain and have damages."³

§ 215. State laws as to fencing against stock.—By the statutes of New York, occupants of adjoining lands are compelled to maintain division fences; and although there are no provisions directly providing that crops must be protected by lawful fences, the practical effect is much the same as though there were.⁴

Such appears to be the application of the common-law rule, as affected by statutory enactments, deducible from the decisions of the Courts, although from the earlier decisions it appears that, however plenary is the statute law in provisions protective of crops from trespass by animals, the injured party is not forced to rely on them, but may look also to his common-law remedy.⁵

In North Carolina, the general statute law is such that "every planter shall make a sufficient fence about his cleared land under cultivation." If his land is so protected, he may recover for damages done by trespassing animals; otherwise, not.⁶

In March, 1871, this general law was so modified, as to certain portions of the State, that the question of "fence law" or "no-fence law" was left to be determined by the people through the local elections; so that if the majority of the votes cast was in favor of "no-fence law," the owner of cattle was mulct in damages for injury committed by his animals, whether the land was fenced or not.⁷

¹ Paschal's Dig. 639, Sec. 3338 et seq.

² Gen. Stats of Tenn. Compilation by Thompson & Steger, Secs. 1682-1685.

³ Stats. at Large, Minn. (Bissel) 1873, p. 568.

⁴ Revised Statutes of New York, 2d Ed. 326 et seq.

⁵ Holliday v. Marsh, 3 Wend. 142; Stafford v. Ingersoll, 3 Hill, 38; Wells v. Howell, 19 Johns. 385; Ryan v. R. & S. R. R. Co. 9 How. Pr. R. 453.

⁶ Revised Code of North Carolina, 1855, p. 294, Sec. 48.

⁷ Laws of North Carolina, 1870-1, p. 282.

The general law, and exceptions therefrom for several of the counties, is the same in Virginia.¹

Similar provisions for exemption of counties from the general law, by submission of the question of "fence law" or "no-fence law," appear upon the statutes of Georgia² and California.³

§ 216. Prescription to fence is recognized at common law as resulting from an assumption of the duty of fencing, and granting to the occupant of the adjoining lands the privilege of grazing cattle on his premises, without guarding them against trespassing upon the lands of him whose estate is charged with the grant. This grant is presumed, from lapse of time, generally, such as is prescribed by the Statute of Limitations as to real property, and that such a grant has actually been made, but the evidence of it has been lost by the lapse of time;⁴ and a covenant thus once established, either by prescription or by grant in usual form, runs with the land, binds the original covenantor, and all who hold under or take estate from him; so, where the agreement as to fencing varies from the duty imposed by statute as to division fences, the agreement of the parties supersedes, as to them, in relation to the subject-matter, the statutory provisions; their agreement becomes a covenant which thereafter runs with the land, and is an

¹ Code of Virginia, 1860, p. 492. Acts of the several assemblies have established new, or altered the bounds of existing, exceptional districts, wherein the "no-fence rule" is the statute law; the first of these exceptions is indicated in the general law above cited; the last appears in the "Acts of Assembly," 1872-3, p. 256.

² Code of Georgia, 1873, Sec. 1455.

³ Hittell's Dig. Vol. 2, Secs. 7241, 7245, et seq. It should be observed that the adoption of the Code of California does not affect the pre-existing acts in relation to lawful fences, estrays, and the trespassing of animals upon private property, as such laws are specially kept in force by the code. (Political Code of California, Sec. 18, Subdivision 23.)

⁴ *Rider v. Smith*, 3 T. R. 766; *Thayer v. Arnold*, 4 Met. 589; *Hewlins v. Shipman*, 5 Barn. & Cres. 221; *Rust v. Low*, 6 Mass. R. 90, in which Parsons, C. J., rendering the decision, said that then (more than sixty years ago) Massachusetts "had been settled long enough to allow of the time necessary to prove a prescription, and ancient assignments by fence-viewers, made under the late provincial laws; and also, ancient agreements made by the parties may have once existed, and be now lost by the lapse of time."

incumbrance within the meaning of a covenant to convey free of all incumbrances.¹

An obligation to maintain in repair a partition fence may also exist by prescription. In the leading case of *Rust v. Low*, it was held that the owner of the cattle doing damage, by trespass on his neighbor's land, might justify by showing that the party complaining was bound by prescription to maintain the fence, and that he might prove it by ancient usage, and such is the doctrine to be deduced from the authorities cited, and the older English cases; although it would appear that the prescription must be specially pleaded.²

¹ *Boyle v. Tamlyn*, 9 D. & R. 430; 6 B. & C. 329; *Blain v. Taylor*, 19 Abb. Pr. R. 228; *Bronson v. Coffin*, 108 Mass. 175.

² *Holbatch v. Warner*, Cro. Jac. 665; *Potter v. Parry*, 7 Weekly Reporter, 182; *Howell v. Salisbury*, 2 Young & Jervis R. 391. "The owners of adjacent lands may become bound, by prescription, to maintain specific portions of their partition fence." (*Harlow v. Stimson*, 60 Me. 347.)

CHAPTER XX.

LAWFUL FENCES.

- § 217. States may prescribe what shall be lawful fences.
- § 218. Statute laws control as to partition fences.
- § 219. General characteristics of fence laws.
- § 220. State laws as to what shall be lawful fences.
- § 221. Fence laws in certain States.
- § 222. State laws as to lawful fences.
- § 223. Lawful fences in certain States.
- § 224. Rivers may be lawful fences.
- § 225. Fences which are as efficient as lawful fences.
- § 226. Obligation of coterminous proprietor as to fencing.
- § 227. Owner of uninclosed lands need not join in fencing.
- § 228. Division fence on either side of water-course.
- § 229. Fence-viewers and their duties.
- § 230. Mode of acquiring jurisdiction by fence-viewers
- § 231. Award of fence-viewers a lien on land.
- § 232. Fence-viewers to assess damages done by animals.

§ 217. States may prescribe what shall be lawful fences.—The right to use one's own land as one chooses, without interference by the law, at first glance appears to be inherent to the ownership of real property, and thence reasoning, it would seem that the fencing of one's field could in no wise, under our system of laws, be enforced, or the mode of inclosing land dictated to its owner. Such is the result of a superficial view of the subject; but a more just conclusion is arrived at by considering that no citizen has enjoyment of property other than by the protection of the law, and even of real estate; his possession is only maintained by submission to the terms upon which such protection is accorded to him. Self-evident as these propositions may be, so late as 1869 they are found to have been controverted, and the constitutionality of legal enactments in the premises has been seriously contested. The result, however, has been that it may be regarded as settled that the constitutional power over the citizen by the State is such that it may prescribe in what manner he may use his land to the ex-

tent of imposing upon him the burden of keeping it inclosed in a particular manner, before he can claim protection under the law from the ravages of his neighbor's stock. The legislature may make such laws as are requisite properly to define the relative duties of the parties one to the other.¹

§ 218. Statute laws control in partition fences.—From the frequency with which statutory enactments as to division fences occur in the laws of the several States, it would appear that the fact had been forgotten that the common law of England had been adopted; moreover, as, by the common law, the owner of cattle must fence them in, and between lands which are exclusively devoted to raising crops no necessity to fence occurs, it appears to result that the law, as it now stands, as to "partition" or "division" fences, is to a very great extent the creature of, and has its existence by, the statutes of the several States. At all events, whether these statutes are to be regarded as declaratory of, or in derogation to, the common-law, the provisions are so precise as to render necessary a careful consideration of the State laws to determine the relative duties and rights of those who hold adjoining lands, as to building and maintaining division fences.

§ 219. General characteristics of fence laws.—The general provisions of the statute laws of the several States are substantially the same, and are to the effect that where two or more persons have farming lands adjoining, each of them is required to build and keep in repair a just and equal proportion of the division fence between them, in all cases where their lands are in such a condition of improvement, reclamation, or devotion to agricultural pursuits, as necessarily demands that they shall be fenced.

¹ *Phillipps v. Oystee*, 32 Iowa, 257; *Jones v. Perry*, 50 N. H. 134. "The legislature of a State has the constitutional power to regulate, by statute, the relative rights and responsibilities of inclosed land, and the owners of stock going at large or kept in adjoining inclosures." (*Wills v. Walters*, 5 Bush, [Ky.] 351.)

Hollister v. Hollister, 35 Conn. 241. But, although legislatures, by enacting certain fence laws and statutes regulating the running at large of stock, have impliedly declared that no action shall lie for injuries done to real estate and crops, by running cattle, unless such fence be made; it should not be considered that the law will permit one person to graze his stock on another's land, whether

Notwithstanding the provisions of the common-law rule and its recognition, it is a fact that has been recognized tacitly, if not openly, that no cultivation of the soil can be safely pursued as employment except in inclosed fields, and the building and maintenance of division fences has hence become an important subject of legislation, and the construction and application of the laws in relation thereto have been matters interesting in discussion and important as to decisions by the Courts of the United States.

§ 220. State laws as to what shall be lawful fences.—

Lawful fences are prescribed in the statutes of the several States, as a general thing, and where the law provides that a fence shall be built or maintained, it is to be presumed that a lawful fence is intended, where the express agreement of the parties is not to the contrary; the law makes an agreement for them, but, as between themselves, they may, if they choose, vary it. Some of the States do not, in terms, prescribe what shall be deemed a lawful fence, but in most of them the legislative enactments in this behalf are so voluminous as to preclude here any description of them other than by reference to the laws themselves, with mention of their chief characteristics.

§ 221. Fence laws in certain States.—In Alabama, all fences must be five feet high, and strong enough to turn stock.¹

Arkansas—The sufficiency of any fence may be determined by viewers summoned to examine it.²

California—A fence of stone four and a half feet high, and of other material five feet high, etc.³

Connecticut—A rail fence four and a half, or a stone wall four feet high.⁴

Delaware—Good fence, four and a half feet high, of wood, stone, or well-set thorn hedge and ditch.⁵

It is fenced or not. (*Union P. R. R. Co. v. Rollins*, 5 Kan. 167; *Logan v. Gedney*, 38 Cal. 579; *Caulkins v. Mathews*, 5 Kan. 191; *Maltby v. Dihel*, 5 Kan. 430.)

¹ Rev. Code Alabama, 1867, Tit. 13, Chap. 8.

² Rev. Stats. Arkansas, Chap. 76; Digest of 1858, Chap. 87.

³ Genl. Laws of California, 1864, Secs. 3029, 3062.

⁴ Rev. Stats. Connecticut, 1866, Chap. 21, Sec. 1.

⁵ Rev. Code Delaware, Chap. 57.

Georgia—Worm fences or ditches must be five feet high or deep, as the case may be, and other fences same height.¹

Illinois—Walls, ditches, or fences five feet high, and sufficient to inclose and restrain sheep.²

Indiana—Any structure in the nature of a fence which is such as good husbandmen generally keep, and shall, on the testimony of skillful men, appear to be sufficient.³

Iowa—A three-rail or board fence, with posts not more than ten feet apart where rails, and eight feet where boards, are used, or any other fence which in the opinion of the fence-viewers may be deemed equivalent thereto.⁴

Kansas—Post and boards or rails, hedge, ditch, palisades, post and wire, at least four and a half feet high and sufficiently close, or stone walls at least four feet high.⁵

Kentucky—Every strong, sound fence five feet high, and close enough to restrain stock, or a stone wall four and a half feet high.⁶

§ 222. State laws as to lawful fences.—Maine and Massachusetts have statutes substantially alike as to what shall be lawful fences, viz., all fences four feet high, of rails, boards, timber, or stone walls, in good repair, and sufficiently close to turn stock, or such other fences as the fence-viewers deem equivalent.⁷

In Michigan and Minnesota, the statute is the same as in Maine, except that the standard of height is four and a half feet.⁸

In Mississippi, all fences, five feet high, substantially and closely built of plank, pickets, or other good material; or hedges sufficiently strong and close to exclude domestic animals of ordinary habits and disposition.⁹

¹ Code of Georgia, 1873, Chap. 9, Secs. 1443-51.

² 1 Gross. Chap. 17, Secs. 11-18; Laws 1865, Chap. 173.

³ 1 Rev. Stats. Indiana, 1862, Chap. 62.

⁴ Iowa Code, 1873, Tit. 11, Chap. 4.

⁵ Genl. Stats. Kansas, 1868, Chap. 49, Art. 1.

⁶ Genl. Stats. Kentucky. 1873, Chap. 55, Art. 1.

⁷ Rev. Stats. of Maine, Tit. 2, Chap. 22, Secs. 1-4; Genl. Stats. Mass. Chap. 25, Secs. 1-2.

⁸ Compiled Laws Mich. 1871, Chap. 14; Rev. Stats. Minn. 1866, Chap. 18.

⁹ Rev. Stats. Mis. 1870, Chap. 33, Secs. 1905 et seq.

Missouri—Fence, sufficiently close to restrain domestic animals, five feet high, of posts and rails, or pallisades; hedges, or turf or worm fence, with corners locked by strong rails, posts, or stakes.¹

Nebraska—A rail fence, six rails high, post and rails, or boards; three rails or boards, an inch thick, and at least five inches wide, or post and four wires—number nine wire—and all at least five and a half feet high; or the fence called “Warner’s Patent,” four and a half feet high.²

New Hampshire has a law similar to the statute of Maine and Massachusetts.³

In New Jersey, all fences are lawful, which, being of post and rails, timber, boards, brick, or stone walls, are four feet two inches high; and all other fences four feet and six inches in height, and so close as to prevent horses and neat cattle from going through or under the same; and partition fences between improved lands must be close and low enough to turn sheep.⁴

In Rhode Island, a hedge, with a ditch three feet deep; a hedge, without a ditch, four feet high; a stone wall, four feet high, and all other kinds of fences four and a half feet high, in good repair, and sufficiently close.⁵

South Carolina—All fences strongly and closely made of rails, boards, or posts and rails, or an embankment of earth capped with posts and rails, or line hedges five feet high.⁶

Tennessee—A sufficient fence, five feet high, and so close from the earth as to prevent the passing through or under of hogs.⁷

Texas—Substantially the same as Tennessee.⁸

Vermont has a statute similar to that of Maine, except that the standard of height is four and a half feet.⁹

Virginia—Every fence five feet high, well built, and suffi-

¹ 1 Wagner Stats. Chap. 71, Sec. 1 et seq.

² Genl. Stats. Nebraska, 1873, Chap. 2, Secs. 18-38.

³ Genl. Stats. N. H. Chap. 128, Sec. 5 et seq.

⁴ Nixon’s Dig. 4th Ed. 331.

⁵ Genl. Stats. R. I. 1872, Chap. 94.

⁶ Stats. at Large, S. C. Vol. 6, No. 2340.

⁷ Code of Tenn. Amended, 1870-1, Chap. 36, Sec. 1 et seq.; Code of 1858, Chap. 3.

⁸ Paschal’s Dig. 639.

⁹ Genl. Stats. Vt. Chap. 102.

ciently close and near the ground to restrain horses, cattle, sheep, hogs, and goats.¹

§ 223. Lawful fences in certain States.—West Virginia—Worm fence four-and-a-half, post and rails or boards, picket fence or hedge four, and stone wall three-and-a-half feet high.²

In Wisconsin, the law is similar to that of Maine, except that the standard as to height is four-and-a-half feet.³

In Maryland, although there is no general law as to what shall constitute a lawful fence, there are local laws for the several counties, by the terms of which the fences of various kinds must be at least four feet high, and close enough to prevent hogs passing through or under them in some of the counties.⁴

In New York, the statute leaves the whole matter of the character of fences to be determined by the electors of each town at "town meetings."⁵

In North Carolina, similar provisions leave the matter to the determination of the voters of the several localities, in elections duly held, except that there is a general statute, by the terms of which each planter is compelled to protect his cultivated fields by a fence at least five feet high.⁶

In Pennsylvania, also, by statute, the owner of corn-fields, etc., must keep his land inclosed by good fences, at least five feet high, of sufficient rails or logs, and close at the bottom; and incorporated boroughs in the Commonwealth of Pennsylvania have power to make needful regulations as to fences.⁷

§ 224. Rivers may be lawful fences.—Rivers, ponds, and creeks, where of such width and depth as to constitute as much of an obstruction to the passage of domestic animals as the prescribed fences, are generally, by the several statutes, designated as lawful fences, and lands which are inclosed by lawful

¹ Virginia Code, 1860, Chap. 99, Sec. 1; Laws 1872, Chap. 239.

² West Va. Code, 1868, Chap. 60.

³ Taylor's Stats. Chap. 17.

⁴ Laws of Maryland, 1870, Chap. 432.

⁵ Rev. Stats. N. Y. Part 1, Chap. 11, Tit. 2, Art. 1, Sec. 1.

⁶ Rev. Code N. C. Chap. 48, Laws 1871, Chap. 187, Laws 1873, Chap. 98, and Laws 1873, Chap. 193.

⁷ Brightley's Purdon Dig. 693-5; Ibid, 168.

fences and water-courses of the character detailed should be deemed lands protected by a lawful fence; but to be such a lawful fence it appears that it must be so far impassable as in that respect to be equivalent to the prescribed fence throughout the year, as otherwise it is not such a water-fence as is designated by the law.¹

§ 225. Fences which are as efficient as lawful fences to turn stock and protect inclosures are generally made equivalent thereto, as a compliance with the fence laws of the various States.

The statutory provisions are not arbitrary, as a general rule, but may more justly be regarded as giving a standard to which fences must conform as to efficiency in order to merit their being regarded as lawful fences.

Thus, in many of the States, after lawful fences are specifically described, qualifying sections occur, which provide, in effect, that any fence which, by reliable evidence, shall be shown to be as strong, substantial, and as well calculated to protect inclosures as either of those described, shall also be deemed a lawful fence, and in other of the States the matter of what shall be deemed lawful fences is left to the judgment of the fence-viewers to decide whether the fence is of a character equal in efficiency to the prescribed lawful fences.²

It has, in some instances, been provided by statute that where

¹ *Lamb v. Hicks*, 11 Met. 496, in which it was held that a partition fence on land that is covered part of the year with the waters of an artificial mill-pond, but is occupied and used as a pasture or mowing land during another part of the year, is not a water-fence within the meaning of the statute.

² *Phillips v. Oystee*, 32 Iowa, 257. "Under the Iowa statute, which requires fences to be of a specific height, a fence of less than the specified height, if it affords equal strength and security, is a lawful fence. The design of the law was to provide security to the inclosed fields of land-owners."

So, in Vermont, any person may impound animals found doing damage in his inclosure, and, under this statute, the point was made that the inclosure must be by lawful fences as prescribed by the statute, but it was held that it is not essential that the inclosures should be by fences which strictly complied with those described as lawful fences. (*Keith v. Bradford*, 39 Vt. 34; *Davis v. Campbell*, 23 Vt. 236.)

Code of West Virginia, 1868, Chap. 60; *Ketcham v. Stolp*, 15 Ill. 341, which was a case where defendant had been, by suit, compelled to build half a division fence, and did so, but his fence did not conform to the requirements of the statute as to lawful fences, but, being found to be a sufficient fence for the purpose, it was held a compliance with the decree.

the sufficiency of a fence shall come in question in any suit, it shall be presumed to have been sufficient until the contrary be established,¹ and as a matter of practice, the rule appears to be that the insufficiency of a fence when an excuse for a trespass is a special defense, and the burden of establishing it falls on the defendant.²

§ 226. Obligation to fence by coterminous proprietors.

—Throughout the United States, the statute laws are to the effect that where coterminous proprietors have their lands under cultivation, each shall build and maintain in good repair his half of so much of the fence as constitutes his boundary.

It may be true, as a fundamental principle of the common law, that no man is bound to fence against the cattle of others, and that the owner of animals should keep them restrained from trespassing upon his neighbor; but, practically, the rule in America is, as a general thing, without vitality, and that it is so is recognized by these statutes. By them, the occupants of lands which are inclosed with fences are required to build and maintain partition fences between their own and adjoining inclosures, in equal shares, while both parties continue to use them for such purposes of agriculture as demand that they should be protected from encroachment by cattle.³

¹ 1 R. S. Part 1, Chap. 11, Tit. 4, Art. 4.

² *Colden v. Eldred*, 15 Johns. 220.

³ Rev. Code Ala. 1867; A. J. Walker, Secs. 1282-92; Chap. 76, Digest of 1858; Chap. 87, Laws 1873; Chap. 96, Rev. Stats. Ark.; Genl. Stats. Conn. Rev. 1866, 443 et seq.; Hittell's Digest Cal. Vol. 1, Sec. 3036. This is not affected by code. (See Sec. 19, Subdivision 23, Political Code, 1872.) Stats. of Ill. Rev. Code, 1852, p. 158; 1 Gross Stats. Ill. Chap. 51; 1 Rev. Stats. Ind. 1862, Chap. 62; Code of Iowa, 1873, Tit. 11, Chap. 4; Genl. Stats. Kans. Chap. 40, Art. 3; Genl. Stats. Kentucky, Chap. 55; Rev. Code La. 1870; Civil Code, Chap. 3, Art. 1; Rev. Stats. Ma. 1871, Tit. 1, Chap. 3; Genl. Stats. Mass. Chap. 25; 1 Comp. Laws Mich. 1871, Chap. 4; Rev. Stats. Minn. 1866, Chap. 18; Rev. Stats. Miss. 1870, Chap. 33; 1 Wagner's Stats. Mo. Chap. 71; Genl. Stats. Nebraska, 1873, Chap. 2; 2 Comp. Laws Nev. 1873, p. 459; Genl. Stats. N. H. 1867, Chap. 128; Nixon's Dig. N. J. Laws, (4th Ed.) 331; 1 Rev. Stats. N. Y. Part 1, Chap. 11; 1 Rev. Stats. Ohio, Chap. 45; Brightly's Purd. Dig. Penn. 168, 693-5; Genl. Stats. R. I. 1872, Chap. 94; Code of Tenn. Sec. 4652, Acts 1870-71, Chap. 36, Sec. 3; Genl. Stats. Vt. Chaps. 28 and 102; Code of Va. 1860, Chap. 99; Code of W. Va. 1868, Chap. 60; 1 Taylor's Stats. Wis. Chap. 17.

In building line fence, each party has the right to go upon the lands of the other, and may deposit thereon, temporarily and for the purposes of the work, stone or other material for the fence. The party so entering upon another's

§ 227. The owner of uninclosed land need not join in fencing.—The obligation to fence arises whenever by joining fences the inclosure is completed; and until such time as the owner of land does surround it by fences, in such manner as to exclude therefrom cattle and other live-stock, he cannot be compelled to pay for, build, or maintain any part of the fence which separates his land from that of his neighbor. Hence, it results that when a fence, being built by one of such coterminous proprietors, is joined to by the other proprietor, and his inclosure thereby made complete, he should pay for half of the fence joined to at its then present value, and thereafter maintain his half in good repair.

Where one party ceases to improve his land, or throws it open to the commons, he must not take away any part of his partition fence adjoining the next improved inclosure if the owner or occupant of such inclosure elects to pay its value within a reasonable time, which is generally fixed by statute.¹

Where adjacent lands have been occupied in common, though owned in severalty, and either party wishes to segregate his tract and occupy it alone, he may compel the other party to build or pay for one-half of the fence necessary to divide the two tracts. The process of so compelling a division of the expense is matter of legislative enactment, the details of which appear by reference to the statutes of the several States.

§ 228. Where a water-course is the boundary the division fence may be on either side. If a pond, stream, or gulch is the boundary of tracts of land which belong to different per-

land, for the indicated purpose, is not a trespasser, so long as he does no unnecessary damage to the premises. (*Carpenter v. Halsey*, 57 N. Y. 658.)

¹ The statutes of the several States, before referred to herein, have provisions more or less explicit to this effect.

It has been held, by the Supreme Court of Illinois, that a partition fence, whether existing by agreement, acquiescence, or statutory provision, cannot be removed until the parties interested in its remaining are properly notified of the intended removal. (*McCormick v. Tate*, 20 Ill. 334.)

Gray v. Waterman, 40 Ill. 522, and in another case, where there was an outer and an inner fence to a field, a party not having an exclusive right to the field must not remove the inner fence, although it belongs to him, without assuming the risk of injury to the crop; and it is no defense to show that the complainant was bound to keep the outer fence in repair, or that he might have repaired it at small expense. (*Buckmaster v. Cool*, 12 Ill. 74; *McCormick v. Tate*, Ante.)

sons, and such natural division is not so far impassable as to constitute a sufficient fence, but it is impracticable to build or maintain one on the line along the center of it, in any case where the circumstances are such that one party could compel the other to erect and keep in repair a division fence, this right is not lost because the fence cannot be put upon the line; but if the occupant of the land on one side refuses or neglects to join with the occupant of the land on the other in making a partition fence on one side or the other, then he who desires the fence to be built may erect it on such side of the stream as may be most expedient, and compel the other party to pay for and maintain one-half of such fence in good repair; and the fence so built is thereafter a partition fence, and is so regarded in all respects, notwithstanding it is wholly upon the land of one of the parties.¹

¹ *Bissell v. Southworth*, 1 Root, 269. It was at an early date (1791) decided in Connecticut that where, a river being the line, no fence could be made, and that, therefore, the case ought to be ruled by principles of reason and justice, either owner of adjoining premises may erect a partition fence; and the use of so much of his neighbor's land as is requisite for that purpose is held to be not adverse, but by permission of the owner. (*Dysant v. Leeds*, 2 Barr, 488.)

These instances, where a fence upon land is not part of the realty to which they are attached, are exceptional from the general rule, and as such liable to strict construction; it is, therefore, prudent to comply strictly with the statutory requirements before putting a fence on another man's land. The presumption is that a fence is part of the realty, and this presumption can be overcome only by showing compliance with the statute. (*Brown v. Bridges*, 31 Iowa, 138; *Voorhies v. McGuinness*, 48 N. Y. 278.)

So far has this reasoning been carried, that it was held that loose rails, laid up in a fence inclosing a field, are a part of the freehold, although the fence is not staked with stakes sunk into the ground. (*Smith v. Carroll*, 4 Greene, 146, and to the same point, *Goodrich v. Jones*, 2 Hill, 142; *Walker v. Sherman*, 20 Wend. 639; *Bishop v. Bishop*, 11 N. Y. 123.)

It has also been held that a fence built upon public land, even by mistake, passes with the freehold to the purchaser from the Government; and if such fence is detached from the realty by a wrong-doer the purchaser's right to it is not divested; and in such a case the party who built the fence becomes a wrong-doer by taking it away. (*Burleson v. Teeple*, 2 Greene, 542.)

In Wisconsin, it has been held that rails placed along the boundary line of lands for the purpose of being laid up in a fence, though not actually applied to that use, will pass by a conveyance of the lands, there having been a manifest appropriation of them to the use of the land. (*Conklin v. Parsons*, 1 Chandler, 240.)

Yates v. Van De Bogart, N. Y. Court of Appeals, Feb. 6th, 1875. "A fence was built by plaintiff's grantees on the west side of the creek, in a place where it could be conveniently put without danger of being washed away, not as a line fence, but to prevent cattle from coming across the creek upon the land.

§ 229. Fence-viewers and their duties.—Fence-viewers, whose official duties are to apportion and allot to each coterminous proprietor his portion of the division fence to be built or maintained, are by statute provided for in many of the States.¹

It is their province to determine such controversies as may arise as to the necessity, under the law, of a fence being built; and if a dispute arises between the owners of adjoining lands, concerning the proportion or particular part of any fence to be built or maintained by either of them, such dispute must be settled by the fence-viewers.

In such case, upon notice, the fence-viewers go upon the land, hear the testimony, and examine the premises; their decision is rendered in writing, must contain a description of the fence, and of the proportion to be built or maintained by each, and be filed with the town clerk, or recorded as provided in the several States.

With similar provisions as to notice, any dispute as to the value of the portion of the fence which has been erected by one of two coterminous proprietors of land, which the other should, by law, pay for, may be referred to the decision of the fence-viewers, and all differences of a like nature, in the matter of the

The owner of the land occupied by defendant, on the opposite side of the creek, had built and kept up at times a fence running across the creek and connecting with the first fence.

"Held, that this did not tend to show an adverse possession; neither did the facts that defendant's horses and cattle sometimes crossed the creek upon the strip between the fence and the creek."

¹ Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Nebraska, Maine, Massachusetts, New York, New Hampshire, Rhode Island, Vermont, Wisconsin, Pennsylvania.

In Connecticut, the duty of fence-viewers is also, to some extent, imposed upon the selectmen of the towns. In New Jersey, the town committee acts as a board of fence-viewers; in Ohio, the township trustees; and in Minnesota, the town supervisors perform their duties; in Alabama fence-viewers are appointed by the County Court.

The Supreme Court of Alabama has held that the partition fence is the joint property of both parties; that each is bound to keep the whole line in repair, and that neither party can maintain trespass against the other for an injury consequent on an insufficient fence, because the duty of maintaining it is upon each.

Therefore, if the fence need repairs, either party may do the work and enforce contribution by action before the appropriate tribunal, although viewers have not been appointed by the County Court. (*Walker v. Watrous*, 8 Ala. 493.)

duty to build, contribute toward, pay for, or maintain fences, are to be adjudicated between the parties by the fence-viewers.¹

§ 230. The mode of acquiring jurisdiction by fence-viewers, and of their procedure, is substantially the same in the several States wherein such officers are by law provided for. The aggrieved party complains to the fence-viewers, who thereupon notify, in writing, the alleged delinquent to build or repair the fence, either within such time as is prescribed by the statute, or the viewers deem reasonable; if their notice and direction are not complied with, the aggrieved party may build or repair the fence, and the fence-viewers, finding it done to their satisfaction, assess the cost; and if, after demand, the party who ought to have built or repaired the fence fail for a specified time, generally one month, to pay the amount assessed, he who has done the work has his action for such amount, with costs and interest.²

¹ The existence of a dispute about a partition fence is sufficient to enable the fence-viewers to interfere. (*Bryan v. Kortright*, 4 Johns. 414.) If, however, there has been no dispute as to the proportion of the expense which each party ought to bear, a decision by the fence-viewers need not be shown. (*Willoughby v. Carleton*, 9 Johns. 136.)

To confer jurisdiction upon fence-viewers, the fence respecting which they determine must be, in fact, a partition fence, and they cannot conclude a party by determining that to be a partition fence which is not. (*Bills v. Belknap*, 38 Iowa, 225.)

² *Clark v. Brown*, 18 Wend. 231. The parties owned adjoining tracts of land, and from defects in Brown's portion of the division fence, Clark's oxen got in upon Brown's crop of corn, and ate so much of it as to kill themselves; the fence-viewers, being called in, assessed Clark's damages at the value of the cattle which had killed themselves. In the lower Court it was held that the jurisdiction of the viewers extended only to ordinary results from defective fences, such as trespass by stock, injury by them to crops, etc., and hence declared in favor of defendant; but on appeal the converse was held to be the law, that the matter was within the province of the viewers to make the assessment, and that their decision was final. The laws of New York, however, afterward restricted the damages to such as shall accrue to lands, crops, shrubbery, and fixtures connected with the land; but the decision is of value, as it gives character to the acts of the viewers, and decides that in a case within their jurisdiction the decision of the fence-viewers is conclusive.

But it is essential that the jurisdiction facts should appear, and it is necessary to prove that the proper notices were given. (*Lamb v. Hicks*, 11 Met. 496; *Franklin v. Wells*, 6 R. I. 422; *Baker v. Lakeman*, 12 Met. 195; *Longley v. Hilton*, 34 Maine, 322.)

It has, however, been held, in Connecticut, that fence-viewers need not give notice of their meeting to estimate repairs. (*Edgerton v. Moore*, 28 Conn. 600.) Also, that fence-viewers were not judicial officers (*Ibid*); but in a subsequent de-

§ 231. Award of fence-viewers a lien upon the land.—

The award by the fence-viewers of a specified portion of a partition fence to the owners of the adjoining tracts of land, to be by them built or maintained, such award having been made ~~on~~ due notice, in proper form, and duly recorded, or filed with the town clerk, becomes by operation of the statutes a servitude upon the lands, by which they are charged, each tract to the other, with the duty of maintaining such fences; it is, however, to be observed, that no person who purposes leaving his land "open commons" shall be charged, nor can his land be incumbered by any award or record; but so soon as he incloses his land by joining fences with his neighbor, he is bound, and the obligation then arises to pay for, and thereafter maintain, one-half of the fence thus joined, so far as it serves to complete his inclosure.¹

§ 232. Fence-viewers to assess damage by animals.—

The assessment of damage done by animals trespassing upon

cision the same Court recognizes the necessity of a notice being given, but declares that it may be of an informal character, and that personal service was not essential (*Greggor v. Stratton*, 29 Conn. 421); and in *Hollister v. Hollister*, 35 Conn. 241, it was held that fence-viewers are *quasi*-public officers, and the fact that they have acted officially is presumptive evidence of their appointment and qualification.

The general current of the laws and decisions of the Courts is that due compliance with the statute as to notice must be shown. (*Harris v. Sturdevant*, 29 Me. 366; *Sanford v. Haskell*, 50 Me. 86; *Fairbanks v. Childs*, 44 N. H. 458; *Bradbury v. Gilford*, 53 Me. 99.)

¹ *Alger v. Pool*, 11 Cush. 450. A part, only, of a continuous line of fence had been the subject of assignment by fence-viewers, and it was thence contended that the assignment was invalid, but the Court held otherwise, neither party having requested that the whole line be divided. (To the same point, *Prescott v. Mudgett*, 1 Shep. 423.)

It was further held that, after such assignment had been made, the obligations of the parties are fixed to maintain the fence accordingly, and cannot be changed without consent of both, by a subsequent view and decision by the fence-viewers. (*Baker v. Lakeman*, 12 Met. 195.)

The Supreme Court of Errors, in Connecticut, have held that the fence-viewers are the sole judges in questions respecting the sufficiency of fences, and are to decide, by direct examination, without any formal hearing or trial, whether an existing fence is or is not such as the statute requires. (*Fox v. Beebee*, 24 Conn. 271.)

If the assignment of the fence-viewers as to partition fences is not recorded, one of the coterminous proprietors cannot maintain an action against the other for double the expense of building the fence, as by the statute provided. (*Ellis v. Ellis*, 39 Maine, 526.)

inclosed lands also devolves, by these statutes, upon the fence-viewers.

Upon application by the party injured, the fence-viewers go upon the premises, estimate the amount of damage done, and give their decision in the form of a written certificate; the payment of the amount so assessed by them may thereafter be enforced by a civil action in any Court of competent jurisdiction, and upon the trial of such action, the report of the fence-viewers is *prima facie* evidence of the amount of the damage sustained.¹

¹ It has been decided, in New York, that any person distraining animals doing damage upon his premises, must have his damages assessed by the fence-viewers within the statute time, or he will forfeit the right to detain the animals, and the owner may retake them. (*Hale v. Clark*, 19 Wend. 498; *Clark v. Brown*.)

In Maine, it has been held that it is obligatory upon a party who undertakes to justify the taking up and impounding another's cattle, to show a full and entire compliance with the requisitions of the statute, or he becomes a trespasser *ab initio*. (*Morse v. Reed*, 28 Me. 481; *James v. Tibbetts*, 60 Me. 557; *Hartshorn v. Schoff*, 51 N. H. 316; *Milligan v. Wehinger*, 68 Penn. St. 235.)

"In a township in which the hog law has not been suspended, it is no defense to an action for damages done to a crop by hogs suffered to run at large, that the crop is not inclosed by a legal and sufficient fence.

"In such case, there is no necessity of applying to the fence-viewers for a certificate and assessment of damages, whatever may be the rule in the case of damage done by neat cattle, or sheep, or by hogs in a township where the hog law has been suspended." (*Wells v. Beal*, 9 Kan. 597; *Baker v. Robins*, 9 Kan. 303.)

CHAPTER XXI.

RAILROAD FENCES.

- § 233. Duty of railroad company to fence.
- § 234. Damage by engines running into animals.
- § 235. General rules as to obligation to fence by railroad companies.
- § 236. State laws as to fencing by railroad companies.
- § 237. Liability of railway companies, rulings of State Courts.
- § 238. Application of fence laws to railway companies.
- § 239. Construction of fence laws as to railroads.
- § 240. Laws to compel railroad companies to fence.
- § 241. Damage to live-stock by locomotives.

§ 233. Duty of railroad company to fence.—Upon whom rests the duty to maintain fences along the sides of railroads has been the subject of judicial comment, to a great extent, both in England and America, as well as legislative enactments both in England and the United States.

By the English law, it is now obligatory upon the railroad companies, before they use land for the purposes of their roads, to fence it, leaving convenient crossings, gates, etc., for the owner of the adjacent lands; and the expenses of such construction in no wise affects the amount of compensation awarded as land damages.¹

In some of the United States, also, similar statutes provide that railroad companies must build and maintain, in good repair, fences along both of the exterior lines of the space devoted to their roads, with cattle-guards at road-crossings sufficient to

¹ 8 and 9 Vic. Chap. 20, Sec. 40. "Cattle of the plaintiffs were driven along a road, across which were some sidings belonging to the defendants, when some trucks of defendants were negligently allowed to run down it across the road, separating the cattle from the drovers, and frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon defendant's railroad, and were killed. Held, that the defendants were liable, and that the damage was not too remote; and that the imperfect condition of the orchard fence was no defense to the action."

Sneesby v. L. and Y. R. R. Co. English Court of Appeal, from the Queen's Bench, Nov. 8th, 1875; 3 Cent. L. J. 141, March 3d, 1876.

prevent domestic animals straying upon the track; and that when such fences and cattle-guards have not been built, or are not in good repair, the railroad corporations, and in some instances, also, its agents, whose duty it is to attend to the compliance with the requirements of the statute, are made liable for all damages to animals by collision with passing trains, caused by animals getting to the track by reason of the absence or insufficiency of fences.¹

In other of the States the obligation is less distinct and compulsory, but is recognized in general terms, or made dependent upon the decision of railroad commissioners or other State officers.²

§ 234. Damage by engines running into animals.—The liability of railway companies for damage done by their engines running into domestic animals has been a question so fruitful of litigation, and the decisions of the Courts have varied to such an extent, that it is very difficult to deduce any general rule in the premises. The statutes controlling the liability of the companies, although in general characteristics similar, differ in details; and the cases in which have been involved the construction of statutes intended to impose upon railroad companies the duty

¹ California Civil Code, Sec. 485. Unless the damage occurs through the neglect or fault of the owner of the animal killed or maimed, and if the company, by award of compensation for land taken, or by direct agreement with the party, is relieved from the responsibility.

In Illinois, general rules and exceptions, similar in effect to those in California, and an exception in favor of the company, that where lands more than five miles from any town, village, or settlement, are open commons; through them the road need not be fenced. (1 Gross, *Stats. of Ill.* Chap. 539, Sec. 25 et seq.)

Laws of Iowa, 1862, Chap. 169, Sec. 6; Revised *Stats. Maine*, Tit. 4, Chap. 51, Sec. 20 et seq.; 1 *Comp. Laws. Mich.* Chap. 75, Sec. 43; *Genl. Stats. Nebraska*, Chap. 2, Sec. 145.

In New York, the statute is, in effect, the same as in California. (*Laws of N. Y.* 1850, Chap. 140, Sec. 44 et seq.; 3 *Stats. at Large*, 635 et seq.; *Laws of 1854*, Chap. 282, Secs. 8-9; 3 *Stats. at Large*, 643; *Ibid.*, 1864, Chap. 582, Sec. 2; 6 *Stats. at Large*, 367; 1 *R. S. Ohio*, Chap. 29, Secs. 35, 180 et seq.; 1 *Taylor's Stats. of Wisconsin*, Chap. 76, Sec. 379.)

² In Connecticut, by statute, every railroad company must build and maintain fences on both sides of the track, except where, in the opinion of the railroad commissioner, it may be deemed inexpedient so to do.

The company so failing to comply with the law forfeits fifty dollars for each day that the neglect continues; half the penalty goes to the citizen who sues, the balance to the State. (*Stats. Conn.* 1866-8, p. 50.)

of fencing their roads, have been so numerous, and have presented so many exceptions to the general rules prescribed by statutes, that a reliance upon the letter of the law is by no means safe. Thus, by the law in Georgia, it is enacted that "the several railroad companies of the State shall be held liable in law for any damage done to live stock or other property"; and, to avoid this liability, it appears that the roads must be fenced; but the Court of last resort in that State has held that, animals having been run over by trains, it was not enough to show that they got upon the company's land through defects in their fences, but the complainant must show negligence in the actual occurrence, on the part of the employees of the company. In another case, that if the owner of the stock neglects proper care, the company is not responsible, and that, on a trial, the burden of proof of actual negligence is on the part of the owner of the animals.¹

Substantially the converse of these propositions have been the decisions of the Courts in New York, Indiana, South Carolina, and some of the other States. The Court of Appeals in New York has held that the statute which prescribes to railroad companies that they shall fence their roads was passed from public considerations; that its purpose was to protect the traveling public, as well as the farmers along the lines of the roads; and that railroad companies are required to fence both sides of their track, and are liable for damages sustained, so long as such fences are not made and maintained by the company.²

The Courts of Indiana declare these statutes requiring railroad companies to fence to be a police regulation for the protection of the public, without regard to any possible duty or

¹ Georgia R. R. Co. v. Anderson, 33 Geo. 110; Jones v. Central R. R. Co. 21 Geo. 104; M. & W. R. R. Co. v. Davis, 13 Geo. 104.

² B. N. Y. & E. R. R. Co. v. Shephard, 35 N. Y. 641. And it was held to be no defense to an action to recover the value of animals killed, that he to whom the cattle belonged was legally bound to build such fence, under a covenant between his assignor and the company. (Ibid.)

Warner v. Keokuk R. R. Co. Sup. Ct. Iowa, Jan. 1876. "Where a party pastures an animal in a field bordering upon a railroad, and it escapes upon the railroad track through a defective fence, and is killed, his right of action against the railroad company cannot be defeated on the ground that the owner of the field had entered into a contract with the railroad company, wherein he agreed to maintain the fence." (Cent. L. J. Jan. 14th, 1876.)

Tracy v. T. & B. R. R. Co. 38 N. Y. 433.

neglect of it on the part of the owner of cattle put to graze on adjoining lands.¹

§ 235. General rules as to obligation of railroad companies to fence their roads cannot, with safety, be drawn from the statutes of the several States and the decisions by their Courts of last resort, inasmuch as the inconsistencies are so apparent as to induce the belief that it is best to regard the law as it stands in the State where the damage, resulting from a failure to fence, has occurred.

From these apparent inconsistencies, it results that, by its statutes, and the decisions of its Courts construing them, each State is a law unto itself to so great an extent as to make interesting a review of conclusions arrived at by the Courts of last resort in the several States of the Union.

§ 236. State laws as to fencing by railroad companies.—In Alabama, it is no defense on the part of the company to show that the cattle were roaming at large. Because the common-law rule, that cattle must be fenced in, never in that State was law, it is questionable whether any negligence on the part of the owner of cattle will exonerate the corporation from damages where the road is not fenced, and, as a general proposition, railroad companies are liable for damages caused by their trains running into or over domestic animals when the requirements of the statute have not been complied with.²

In California, any railroad company which continues running its cars upon an open track undertakes, at its peril, that no harm

¹ *I. R. R. Co. v. Townsend*, 10 Ind. 38; *Same v. Meek*, *Ibid*, 502; *J. R. R. Co. v. Applegate*, *Ibid*, 49; *Same v. Dougherty*, *Ibid*, 549; *T. & R. E. Co. v. Cory*, 37 Ind. 218; *Jeffersonville Etc. R. R. Co. v. O'Connor*, 37 Ind. 95; *Same v. Sullivan*, 38 Ind. 262. Under the Indiana statute, a railroad company is liable for cattle killed, where it has not discharged its duty of fencing, whether the county commissioners have made any order as to the running at large of cattle, or not. (*Jeffersonville R. R. Co. v. O'Connor*, 37 Ind. 95.) To same effect, *Fritz v. Milwaukee R. R. Co.* 34 Iowa, 337. But a railroad company is not liable, under the Iowa laws, 1862, Chap. 169, for cattle killed on its track, unless the same were running at large at the time of the accident. In *Smith v. Chicago R. R. Co.* 34 Iowa, 96, it was held that if cattle, while being driven, in charge of the owner or his servant, along a highway, toward a railroad crossing, escape, or run on to the track, and are injured, the company is not liable.

² *N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *M. R. R. Co. v. Malone*, 46 Ala. 391.

shall come to the stock running in the field through which the road runs for want of a proper fence.¹

In Connecticut, the railroad company must fence, unless, in the settlement of damages for taking land for their track, an allowance is made to the owner for fencing; and in that event, unless the owner of the land so builds and maintains the fence, he cannot recover damages for injury to his animals by passing trains. The company, however, as to the public, is bound to see that fences are built and maintained, except where the railroad commissioners deem it inexpedient or unnecessary.²

In Georgia, the decisions are to the effect that mere want of fences is not sufficient to charge the company with damages for injury to animals. The burden of proof of negligence is on the plaintiff, and he must show lack of due care in running the trains before he can recover.³

The Illinois statute has been construed to the effect that the company must maintain fences, and is liable for all damages resulting from its neglect so to do, regardless of the question whether it used due care or not in running its trains.⁴

§ 237. Liability of railway companies; rulings of State Courts.—In Indiana, the Courts have held that railroad companies must, except in certain specified cases, keep their roads fenced; that the law which directs them so to do is a police regulation for the public safety, making the companies liable for all damages which result from a failure on their part to comply with this statutory provision, whether the animals injured belong to the proprietor of the land through which the road runs or not, and without regard to negligence on the part of the owner of the animals.⁵

¹ *McCoy v. Cal. P. R. R.* 40 Cal. 532; *Waters v. Morse*, 12 Cal. 535.

² *Genl. Stats. Conn.* Tit. 7, Chap. 7, Sec. 488 et seq.; *Laws of 1866*, Chap. 87.

³ *M. & W. R. R. v. Davis*, 13 Ga. 68; *Jones v. Central R. R. Co.* 21 Ga. 104; *G. R. R. Co. v. Anderson*, 33 Ga. 110.

⁴ *St. Louis R. R. Co. v. Linden*, 39 Ill. 433; *I. C. R. R. Co. v. Swearingin*, 47 Ill. 206; *I. C. R. R. Co. v. Arnold*, *Ibid.*, 173; *Lane v. Whalen*, 42 Ill. 396; *Ohio R. R. Co. v. Bunbaker* 47 Ill. 468.

⁵ *I. R. R. Co. v. Townsend*, 10 Ind. 38; *Lane v. Meek*, *Ibid.*, 502; *J. R. R. Co. v. Applegate*, *Ibid.*, 49; *J. R. R. Co. v. Dougherty*, *Ibid.*, 549. Where sufficient fences are maintained, no recovery can be had without proof of negligence on the part of the employees of the company. (*N. I. R. R. Co. v. Martin*, 10 Ind.

In Iowa, it appears that rules as to partition fences do not apply to owners of land and railroad companies;¹ but, as to third persons, railroad companies must fence their roads,² and generally they are liable for all damages which occur by reason of defective fences;³ but it must appear that the company had reasonable notice of the defect, and the burden of proof of this, as of other matters of neglect, is on the party complaining.⁴

In Kentucky, the obligation to fence does not appear to have been imposed upon railroad companies, and damages can only be recovered for injuries caused by negligence, the want of fences being in itself no evidence thereof.⁵

§ 238. Application of fence laws to railway companies.—In Louisiana, the same rule applies: the company is not absolutely required to fence, and damages to stock, which, from the absence of fences, stray upon the track, can only be recovered by showing wanton neglect on the part of the employees of the company, in so running the train as not to avoid collision with the cattle.⁶

In Mississippi, one seeking to recover damages from a railroad company for injury to his stock, which had strayed upon the track, must allege and prove negligence further than a failure to fence.⁷

In Missouri, the statutes to compel railroad companies to fence have been held constitutional and in force, as a police regulation, for the protection of the public; and that where injuries to cattle result from their having strayed upon a track which was not properly fenced, the owner of the cattle should

460.) And in the exceptional cases, wherein the company is not bound to fence, no recovery whatever can be had without proof of negligence. (*I. R. R. Co. v. Caldwell*, 9 Ind. 397; *I. R. R. Co. v. Brevoort*, 30 Ind. 324.)

¹ *Henry v. Dubuque R. R. Co.* 2 Iowa, 821.

² *Russell v. Hanley*, 20 Iowa, 219.

³ *Hinman v. Chicago R. R. Co.* 28 Iowa, 491; *Andre v. N. W. R. R. Co.* 30 Iowa, 107.

⁴ *Aylesworth v. C. R. R. Co.* 30 Iowa, 459; *Dewey v. C. R. R. Co.* Ibid, 373; *Comstock v. Des Moines R. R. Co.* 32 Iowa, 376.

⁵ *L. R. R. Co. v. Ballard*, 2 Met. 177; *L. R. R. Co. v. Wainscott*, 3 Bush, 149; *L. R. R. Co. v. Milton*, 14 B. Mon. 75.

⁶ *Knight v. N. O. R. R. Co.* 15 La. 105.

⁷ *Raiford v. M. R. R. Co.* 43 Miss. 233; *V. & J. R. R. Co. v. Patten*, 31 Miss. 156; *M. R. R. Co. v. Blakeney*, 43 Miss. 218; *Same v. Orr*, Ibid, 279.

recover his damages against the company, without proof of further negligence.¹

In New Hampshire, railroad companies must keep their roads fenced, and, failing to do so, are liable for resulting damages.²

In New York, the construction given to the laws by the Courts is that upon railroad companies is imposed the duty of maintaining fences on both sides of the track; that this duty is to the public and the owner of adjoining lands, and the company must make good all damages resulting from a neglect to keep the road fenced.³

§ 239. Construction of fence laws as to railroads.—

In South Carolina, railroad companies must fence, and the killing of animals by collision with a train is prima facie evidence of negligence,⁴ and substantially the same ruling has been had in Tennessee.⁵

In Wisconsin, railroad corporations must erect and maintain fences along the sides of their roads, and are liable for damages resulting from a failure to do so.⁶

In Pennsylvania, a railroad company is not bound to fence its road; an owner of cattle suffered to go at large, and which are killed or injured, has no recourse on the company or its servants; on the contrary, he may be liable for the damage done by them to the company, or the passengers on trains.⁷

¹ *Trice v. H. R. R. Co.* 49 Mo. 438; *Cecil v. P. R. R. Co.* 47 Mo. 246; *Ibid v. H. R. R. Co.* 45 Mo. 469. In *Laffity v. H. R. R. Co.* 44 Mo. it was held that the chief object of the statute was to protect the traveling public from accidents by running into animals.

² *Dean v. S. R. Co.* 2 Foster, 316.

³ *B. N. Y. & E. R. R. Co. v. Shepard*, 35 N. Y. 641; *Tracy v. Troy & B. R. R. Co.* 38 N. Y. 433. "An act induced by public considerations, the purpose of which is to protect the traveling public and the owners of domestic animals along the line of a railroad, should receive a liberal construction to effectuate the benign purpose of its framers; and every statute should be expounded, not according to the letter, but according to the meaning." (*Corwin v. N. Y. & E. R. R. Co.* 13 N. Y. 42; *Munch v. N. Y. C. R. R. Co.* 29 Barb. 647; *Chapman v. N. Y. C. R. R. Co.* 33 N. Y. 369; *Morrison v. N. Y. & N. H. R. R. Co.* 32 Barb. 568.)

⁴ *Murray v. S. C. R. Co.* 10 Rich. Law, 227; *Dawner v. Same*, 4 Rich. Law, 329.

⁵ *Home v. M. R. R. Co.* 1 Coldwell, 72.

⁶ *Sikes v. C. R. R. Co.* 24 Wis. 370; *Brown v. M. R. R. Co.* *Ibid*, 39.

⁷ *Railroad Co. v. Skinner*, 19 Penn. St. 298; *Drake v. P. & E. R. R. Co.* 51 Penn. St. 240; *N. P. R. R. Co. v. Rehman*, 49 Penn. St. 101. "An owner of mules killed upon the track of a railroad company, by an engine and cars, cannot re-

In Ohio, if the owners of cattle permit them to run at large in the vicinity of an uninclosed railroad track, and do not choose to avoid danger to their cattle by keeping them within their own inclosures, they can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, exercise ordinary and reasonable care to avoid damaging the property of others.¹

§ 240. Laws to compel railway companies to fence.—

In Massachusetts, under the provisions of General Statutes, Chap. 33, Secs. 42, 43, it is incumbent upon railroad companies to make and maintain fences, suitable for the benefit and security of the land-owner, and of travelers by the companies' trains, upon both sides of the railroad, for its entire length.² And the only rulings of the Courts in Maine have been to the same effect.³

In Vermont, the obligations upon railroad companies to build a fence along their road only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there; that if one suffer his animals to run at large, and they

cover damages therefor, though they escaped from a properly fenced inclosure without his knowledge, and were on the highway, at its intersection with the track, at the time of the accident."

¹ C. O. R. R. Co. v. Lawrence, 13 Ohio St. 66; but in *Kerwhacker v. Cleveland C. & C. R. R. Co.* 3 Ohio St. 172, it was held: "There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their roads open and uninclosed, by sufficient fences and cattle-guards, they take the risk of intrusions on their roads by animals running at large, as do other proprietors who leave their land uninclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or injury to them by unavoidable accident; and the company, in leaving its road unprotected by an inclosure, runs the risk of animals at large getting upon the road, without any remedy against the owners of the animals."

² *Keliber v. C. R. R. Co.* 107 Mass. 413. Plaintiff's cow got through a dry culvert, upon the track, and was run over; the company might have so arranged the culvert as to prevent cattle passing, but did not do so, as in the dry season it was passable for stock; there was no pretense of negligence in running the train, but the road was held liable, without any proof of negligence. (*Rogers v. N. R. R. Co.* 1 Allen, 16.)

But if the loss occurs through the negligence of the owners of animals, by allowing them to be unlawfully on land, from which they stray, through an unsuitable fence, upon the track, and are killed, the company is not responsible, although the fence was one which the company ought to have maintained in serviceable condition. (*Eames v. S. & L. R. R.* 98 Mass. 560.)

³ *Wyman v. P. & K. R. R.* 46 Me. 162; *Gilman v. E. & N. A. R. Co.* 60 Me. 235.

get upon lands where the owner of the animals has no right to pasture them, and thence upon the railroad track, through insufficient fences, the owner cannot claim to be reimbursed his loss by reason of trains running down his stock.¹

In Michigan, the decisions of the Courts are in accord with those of the State of New York. The necessity, on public and private grounds, for the protection afforded by fences along both sides of the railroad, being perceived, the duty of so keeping the road fenced is imposed upon the company, and it is primarily liable for injuries which result from its failure to do so.²

In Minnesota, it has been held that the common-law rule, that he who pastures animals must fence them in, applies between the owners of stock and railroad companies; that the law does not require railroad companies to fence in their roads, and that he who suffers his animals to run at large does so at his own risk of having them stray upon railroad tracks, and be killed by passing trains.³

§ 241. Damage to live-stock by engines.—General propositions as to the liability of railroad companies for injuries done to animals by being run into by trains may be deduced from the very numerous decisions, to the effect that where the owner of the animals is in fault, or it does not appear that the company was bound to have its road fenced, the corporation is not liable, unless, after the animals are discovered, the persons running the train might, by the exercise of reasonable care, have avoided the collision.⁴

The obligation to make and maintain fences, both at common law and under the statutes, applies only as against the owners of the fields through which the road runs, and, except in the

¹ *Bemis v. C. & P. R. R. Co.* 42 Vt. 373, 379; *Jackson v. R. & B. R. R. Co.* 25 Vt. 150.

² *B. C. & E. S. R. R. Co.* 21 Mich. 402.

³ *Locke v. St. P. & Pac. R. R. Co.* 15 Minn. 350.

⁴ *Scott v. W. & R. R.* 4 Jones' Law, 482. "Most of the better considered cases certainly adopt this view of the subject, and some, perhaps, go even further in favor of exempting the company from liability, where they were not originally in fault, and the animals were exposed to injury through the fault of the owner, mediately or immediately." (1 *Redfield on Railways*, 465; *I. & C. R. R. v. Caldwell*, 9 Ind. 397.)

States where there are no restrictions, by common-law rule or statutory provisions, against cattle running at large, the company is not responsible for injury to animals which, being without right upon lands adjoining the road, get upon the track through insufficient fences.¹

¹ The proposition appears to be generally conceded that cattle, running at large in the public road, are to be deemed improperly there; that the public have but an easement to travel over it; that "the public interest in a highway comprehends the right of every individual to pass and repass upon it, in person and with his property, but confers no right to use it as a sheep-walk, or pasture ground for cattle." "On this strict ground, I think the town regulation, assuming to authorize cattle to *run at large*, was wholly void." (Per Beardsley, C. J. in *T. R. R. Co. v. Munger*, 5 Denio, 255, 264; 15 Johns. R. 453; *Wells v. Howell*, 19 Johns. 385; *Stackpoole v. Healey*, 16 Mass. 33; *Holladay v. Marsh*, 3 Wend. 142-47.) And if animals escape from their owner's premises into the public road, "and thus get upon the track of the railway, where it intersects the highway, and are killed, the company is not liable." (1 *Redfield on Railways*, 465; *Towns v. C. R. R. Co.* 1 Foster, 363; *Sharrod v. L. & N. W. R.* 4 Exch. 580; *Halloran v. N. Y. & H. R. R. Co.* 2 E. D. Smith, 257.) But see *Convin v. N. Y. & E. R. R. Co.* 13 N. Y. 44. Section 44 of the general railroad act was under consideration. The language is: "Every corporation formed under this act shall erect and maintain fences on the sides of their road," etc. "Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon." Some oxen, which did not belong to the owner of land adjoining the railroad, got into the highway; thence upon land through which the railroad ran; and thence, there being no fences, upon the track, and were killed by a passing train. The action was damages by the owner of the oxen against the company. It was held that the design of the section was to require railroad companies to inclose their track within substantial fences, and to guard it by the ditches called cattle-guards from the approach of animals wandering on the highways; and that one method provided for securing that object is the provision charging the companies with damages for all injuries done to animals, where they have disregarded the statute; and that it is not material from whence, or under what circumstances, the animals come upon the track, provided they are enabled to get there by the absence of fences or cattle-guards.

But in the late (1872) case of *Indianapolis Etc. R. R. Co. v. Harker*, 38 Ind. 557, it was held that the general rule is that, in the absence of some statutory regulation for allowing animals to run at large, every man shall fence in his own stock. Hence, where it appeared that plaintiff had knowingly permitted his cattle habitually to run at large in the immediate vicinity of a railroad, where fencing was not required, it was held that he was guilty of negligence; and, if his stock was killed, he had contributed to the injury, and could not complain, there being no proof of wantonness in the management of the train.

CHAPTER XXII.

POUND LAWS AND ESTRAYS.

- § 242. Right to distrain animals, damage feasant.
- § 243. The common-law rule as to animals found doing damage.
- § 244. Pound laws in the United States.
- § 245. The constitutionality of pound laws.
- § 246. Proceedings under pound laws, actions in rem.
- § 247. Pound laws must be strictly followed.
- § 248. Title acquired at a pound sale.

§ 242. The right to detain animals, damage feasant, was one which existed at common law, and it was recognized and regulated by statute. The proceeding was always purely remedial. The party distraining was authorized to detain the property in pledge for the payment of his damages. By seizing it at the time and on the premises where the injury was committed, he was enabled to secure redress for an actual wrong against an unknown or irresponsible owner.

If, however, the animal escaped from his premises, even though he was in fresh pursuit, his right of distress was lost.

The party making the seizure was required to have the damages promptly appraised by the fence-viewers, upon a view of the premises and the examination of competent witnesses; they were bound to certify the amount of damages done, and thereafter, within twenty-four hours, he who had taken up the beasts was required to put them into the public pound, where the owner could find and retake them on replevy, or by paying costs and expenses.

The party distraining was bound to give notice to the owner, if known, that he might have an opportunity to so replevy or redeem his property.

The remedy by distress was cumulative, and satisfaction obtained in this mode was a bar to an action for damages.¹

¹ 3 Woodeson, 226; 3 Bac. Abr. Title Distress, F; 3 Black. Com. 6; 2 Wait's Law and Pr. 778; Colden v. Eldred, 15 Johns. 789.

Practically, at common law, the remedy by distress was of but little value, as, if the owner of the animals remained obstinate, and would neither redeem nor replevin, it became no remedy at all, unless some statute, authorizing the sale of the pledge, in the nature of an execution, effectuated and completed the remedy.¹

§ 243. The common-law rule as to animals found damage feasant.—Under the common law, and throughout the United States where that system prevails, a land-owner was permitted to be his own avenger or to minister redress to himself by distraining another's cattle *damage feasant*. Otherwise, it might be impossible, at a future time, to ascertain whose cattle they were that committed the trespass. And when cattle were distrained for that cause, it became the duty of the distrainer to put them into some inclosure denominated as a pound, which might be a common or a special pound—overt or covert—and there keep them. If in a special pound covert, as in the impounder's barn, he was bound to properly feed and care for them. When thus impounded, they were kept in the nature of a pledge until satisfaction was made, unless the owner (*replegiavit*) took back the pledge by a replevin writ. Thus the distress was the common-law security.²

In the statutes of most of the States are to be found special provisions and enactments upon the topic, either abrogating the common-law rules, or declaring them and making special provisions for their application.

As a general proposition, where a remedy existed at common law and the statute creates a new remedy in the affirmative without a negative, express or implied, a party may still seek his remedy at common law. Particular remedies are to be followed

¹ 3 Bl. Com. p. 10. "And so the law still continues with regard to distresses of beasts taken *damage feasant* and for other causes not altered by act of Parliament, over which the distrainer has no other power than to retain them till satisfaction is made."

² Ibid. p. 14. "This kind of distress, though it puts the owner to inconvenience, and is, therefore, a punishment to *him*, yet if he continues obstinate and will make no satisfaction or payment, is no remedy at all to the distrainer." (Rockwell v. Nearing, 35 N. Y. 317.)

³ 2 Black. Com. 6, 13; Cutts v. Hussey, 15 Maine, 237.

in the particular cases contemplated by the law created for them, but in other cases the general law furnishes the remedy.¹

§ 244. Pound laws in the United States.—In the United States, the principles of the common law, in this respect, have been either recognized by the Courts or put into more practical effect by legislative enactments, making provision for the sale of animals taken doing damage.

The jurisdiction of towns over their highways has also given rise to necessities, more or less imperative, to provide against animals running at large in them, and upon the statute books of the respective States are to be found laws providing for public pounds, and officers whose duty it is to take up and sell domestic animals found at large in the streets or roads.

By a comparatively early case,² it has been held that the common-law rule has been superseded by statutory enactments covering the ground in the several States, and that in America there is, practically, no such thing as distress of beasts *damage feasant*, as it was known at common law; such appears to be the tacit admission to be drawn from the current of American decisions, as the Courts generally ignore the English rule, and proceed alone upon the several statutes and the constitutions of the States respectively.

¹ *Boynton v. M. M. F. Ins. Co.* 4 Metc. 216; *Mosher v. Jewett*, 63 Me. 88-9. "At common law, cattle could be impounded either in a common or a private pound, at the option of the impounder. The statutes of New Hampshire, Vermont, and Massachusetts, respectively, require towns to erect and maintain pounds, but provide that creatures must be impounded in the public pound, if there be any in the town, otherwise, in the barn or inclosure of the person taking them up. To be sure, there is no such express provision in the statute of this State, but it should practically receive the same construction."

² *Webber v. Clason*, 35 Me. 28; *Thayer v. Arnold*, 4 Metc. 591; *Mosher v. Jewett*, 63 Me. 84. "In a town in which there is no pound or pound-keeper, a person may legally detain in his custody an animal taken upon his premises *damage feasant*, and has a lien upon the animal for expenses necessarily incurred in taking suitable care of it."

By statute, the owner of lands trespassed on by domestic animals may sue for damages and distrain; the same law provides that each town shall keep a pound and have a pound-master, (*Revised Statutes of Maine*, 1871, p. 272 et seq.) and if the town fails in this duty the citizen does not lose his remedy, but may distrain without the aid of the public pound-master.

² *Cocker v. Mann*, 3 Mo. 475; *Walters v. Moss*, 12 Cal. 538; *Commerford v. Dupuy*, 17 Cal. 310.

Such appears to be the inevitable result of a consideration of the relative condition of things, as to fencing, in the parent country and the States of the Union; in the former, the universal rule has been to maintain inclosures; in the latter, inclosed fields, certainly at the time when constitutions have been framed and adopted, were exceptional.

§ 245. The constitutionality of pound laws, and the title to the animals sold under them, has, however, been seriously questioned in many instances.

The fault most frequently complained of is that the pound laws generally fail to make provision for judicial investigation of the question whether or not an infringement of the law has occurred; the pound-master, finding the animal at large, or the owner of the close upon which the animals have trespassed, and are found *damage feasant*, give notice, it is true, of the fact that the animals are taken up and will be sold; the owner *may* replevin, and so, taking the affirmative, prove, if he can, that no violation of the law has occurred; but it is said that this is no more in consonance with the general provision "that no person shall be deprived of life, liberty, or property, without due process of law," than it would be to compel one accused of crime to remain incarcerated until he proved his innocence.¹ But, on

¹ *Poppen v. Holmes*, 44 Ill. 360. "To ascertain whether a penalty has been incurred or not is a proceeding purely judicial in its character, and the power cannot be exercised by the pound-master by virtue of his office; nor can a town, by its by-laws, authorize the pound-master to sell property without a *judicial ascertainment* that some law has been violated."

Bullock v. Gamble, 45 Ill. 218; *Willis v. Segris*, *Ibid*, 238; *Donovan v. Vicksburg*, 29 Miss. 247. By the statement of the case it appears that, by the charter of the city of Vicksburg, it was authorized to make ordinances regulating streets, etc.; that it passed an ordinance providing that hogs found running at large should be taken up and sold.

"No process is required to be issued for the seizure or the sale, nor notice given to the owner, either actual or constructive, nor is there any opportunity given to him to appear and show cause why the ordinance should not be enforced against his property. The entire proceeding is summary, and calculated to deprive the party of his property in all cases, without notice or trial, and however clearly he might have been able to show that the property seized was within the operation of the ordinance.

"Upon such notice, and with an opportunity allowed him to show cause against the enforcement of the ordinance against him, he might have been able to show that the hogs had just broken from his inclosure when they were seized, and that he had not had time to retake and secure them; or that the inclosure had been

the other side of the question, it has been held that the provisions of statutes authorizing the seizure of animals trespassing on private property, are constitutional; that such statutes do not impose penalties for the trespass, but simply prescribe and fix the remedy therefor; and remedies are clearly within the province of legislation. The temporary seizure and detention of property authorized by such statutes, awaiting judicial action, are not violations of the constitutional provision—that no person shall be deprived of property without due process of law.¹

torn down for necessary purposes during the raging of a fire in the city, or by a tornado, and that it was impossible, under the circumstances, to confine them again before they were seized; or he might have been able to show that they were turned loose by the procurement of the parties interested in having them seized and sold." Per Mr. Justice Handy, in delivering the opinion of the Court.

Rockwell v. Nearing, 35 N. Y. 302. In which was considered the question—whether stock trespassing could, under the statute of that State, be taken and sold for damages done by them, under the pound laws, and it was held that the laws permitting them to be sold were unconstitutional so far as they authorized the seizure and sale, without judicial process, of animals found trespassing within a private inclosure. (See, also, *Taylor v. Porter*, 4 Hill, 146-7; *The Six Carpenters' Case*, 8 Coke, 290; *Sackrider v. McDonald*, 10 Johns. 253; *Dumont v. Swift*, 4 Denio, 320; *Doubleday v. Newton*, 9 How. 71; *Shaw v. Kennedy*, 2 Taylor, [N. C.] 158.)

¹ *Rood v. McCargan*, Supreme Court Cal. 29 Cal. 117. Defendant was in possession of land leased by plaintiff, on which the hogs of the latter trespassed and destroyed grain. By a local statute for the county of Butte, in which the lands lie, (Stats. Cal. 1857, p. 106) a provision is made that if hogs be found trespassing, the owner or proprietor of the premises "may take up and safely keep, at the expense of the owner, all such hogs so found trespassing," and giving notice. Then, if the owner, within five days after notice, does not pay charges, expenses, and damages, the hogs must be delivered to a constable, who shall sell them, and from proceeds pay the charges. If the parties cannot agree as to amount of damages, they must submit them to arbitration, and if the owner fails to appear or to select arbitrators, the constable must appoint them for him.

Under this law, and also a claim that the principle of the common law is in force, that animals *damage feasant* may be so taken up, the defendant took and shut up on his premises the hogs, and on refusal to give them up the owner sought to get them by replevin.

The controversy became narrowed to the claim, by the plaintiff, that the act of the legislature was unconstitutional, or that it deprived him of his property without due process of law. The Court, by Crockett, J., said: "I discover no plausible ground on which the first three sections of the act can be impugned as obnoxious to any constitutional objection. They merely authorize hogs *damage feasant* to be impounded by the owner of the premises until the damage they have committed and the cost of keeping them shall be paid. They only create a lien on the property for the damages and costs, with a right to the possession until the lien is satisfied. That it is competent for the legislature to con-

§ 246. Proceedings under pound laws—Actions in rem.

—The custom, under these pound laws, of selling animals found running at large in the highways, or *damage feasant* in inclosed fields, has, notwithstanding these decisions already cited, been nearly universal, and has, by usage, if not absolutely by decisions of the Courts, become *stare decisis*.

That such is the case is recognized in the later decisions to the effect that it is no objection to the proceedings that personal notice to the owner or other claimant of the animals is not made necessary by the law, or that the proceedings are to some extent summary.

The statutory provisions are, as for proceedings *in rem*, the penalty or forfeiture attaching to and being a lien upon the offending animals. The owner may or may not be known; the animals are not in the actual possession and custody of any one, either as owner or otherwise; they are "running at large."

In analogy to proceedings in other cases *in rem*, or for enforcing specific liens, or upon forfeiture of property, the legislatures have provided for notice, either actual or constructive, in such form and for such length of time as has been thought reasonable and best calculated to inform the owner of the proceedings, and give him an opportunity to be heard; and the mode and manner of giving the notice is neither unreasonable nor unnecessarily arbitrary.

The adoption of pound laws is generally local, and where the necessities of towns or villages are such as to demand their adoption, or the lands are so generally inclosed as to call for the passage of laws for distraining animals *damage feasant*, he who keeps stock may fairly be presumed to know, when they are missing from their range and watering-places, that the pub-

fer such a lien on cattle taken *damage feasant*, and to authorize their detention until the damages and expenses are paid, was decided in *Cook v. Gregg*, 46 N. Y. 441, a case very similar to the present one.

"We are not to be understood as intimating an opinion as to the constitutionality of the act, that question not being before us."

The other sections refer to the mode of assessing damages. The case of *Cook v. Gregg*, 46 N. Y. 442, goes further, and holds that such laws are constitutional so far as they provide for holding the animals until damages are paid; and to the same point, see *Hall v. Clark*, 19 Wend. 488; *Garabrant v. Vaughn*, 2 B. Monroe, 327; *Ford v. Ford*, 3 Wis. 399; *Burrows v. Fassett*, 36 Vt. 625; *Harriman v. Field*, 36 Vt. 341.

lic pound is the place to look for them, and his action of replevin is the legitimate response which he should make to the notice of impounding as to an order to show cause why they should not be sold.¹

§ 247. Pound laws to divest ownership of property must be strictly followed.—In all summary proceedings to divest a party of title to his property, the law authorizing the

¹ *Campbell v. Evans*, 45 N. Y. 356, in which the decisions hereinbefore cited are reviewed, and it is held that "the provisions of the statute as to the seizure of animals running at large in the public highways are constitutional and valid, and it is no objection to the proceedings that personal notice to the owner, or other claimants of the property, is not made necessary by the act, or essential to the jurisdiction of the magistrate, or that such proceedings are, to some extent, summary."

So, in *Cook v. Gregg*, 46 N. Y. 439, it was held that the laws authorizing the impounding and sale of animals found *damage feasant* upon an inclosed field, are constitutional. (*Pickard v. Howe*, 12 Metc. 198; *Leavitt v. Thompson*, 52 N. Y. 62; *Dalby v. Woolf*, 14 Iowa, 228.) But in Iowa, to entitle a plaintiff to recover for damages caused by defendant's cattle, while running at large, breaking into the close of plaintiff, and destroying his crops, he must show that the premises trespassed upon were inclosed by a lawful fence. The common-law rule, that every man is required to keep his cattle upon his own premises, under penalty of answering for damages for injuries committed by them while running at large, is not applicable to the wants, habits, and necessities of the people of that State, nor in harmony with the genius of her institutions, and therefore has not been adopted in, and is not the law of, that State. Therefore, one who there sues for a trespass by cattle on his land must show that he maintained a sufficient fence. (*Frazier v. Nortinus*, 34 Iowa, 82.) And, by parity of reasoning, it appears that, to sustain an impounding of animals *damage feasant*, a like rule should apply.

So, in California, it is held that a party cannot recover for injuries done by cattle of defendant breaking into plaintiff's close, unless the land entered be inclosed by a fence of the character described by the statute, or, at least, by an inclosure equivalent, in its capacity to exclude cattle, to the statutory fence. (*Commerford v. Dupuy*, 17 Cal. 308.)

So, in Maine, the inclosure must be by "lawful fences." (*Vide Heath v. Ricker*, 2 Me. 408.) "The right to sell beasts taken *damage feasant* is given only in cases where the injury was done to lands inclosed with a legal and sufficient fence." (*Eastman v. Rice*, 14 Me. 419; and, to the same effect, *Colden v. Eldred*, 15 Johns. 220; and, inferentially, *Grice v. Randall*, 23 Vt. 239.) "We do not suppose that it was indispensable to the defendant's right to impound creatures doing damage in his fields that the fence adjoining the highway should have been legally sufficient, such fence being expressly excepted in the revised statutes."

In *Hine v. Munson*, 32 Conn. 219, it was held that the owner of an inclosure may lawfully impound cattle which have broken into it from an adjoining inclosure, through the insufficient fence of the owner of the cattle, although his own part of the divisional fence was also insufficient. See, also, *Mills v. Stark*, 2 N. H. 512, and also *Drew v. Spaulding*, 45 N. H. 472, in which it was held that, to justify a distress of cattle *damage feasant*, it is not necessary to show that the land is inclosed, except as against an adjoining owner.

proceeding must be strictly pursued, or the whole transaction will be void. In all cases where the party whose rights are to be affected has no actual notice and cannot be heard in support of his rights, it is no more than reasonable and proper that a strict compliance with the requirements of the law under which the proceeding is conducted shall be regarded as essentially necessary to the divestiture of his title.¹

Under constitutional governments, the citizen can only be deprived of his property by a judicial decision, upon sufficient notice and reasonable time and opportunity being afforded to be fully heard in his defense.

In all departures from the policy of this general rule and policy, the Courts have been rigid in demanding a strict compliance with the requirements of the statutes authorizing the proceeding; and hence, it results that title to property can be divested, under pound laws, only by strict compliance with the laws.²

§ 248. The title acquired at a pound sale depends entirely upon the rigid adherence, by the officer, to the provisions of the law under which the animal has been taken and the sale been made.³

¹ *Rex v. Cooke*, 1 Cowper, 26. "Where by statute a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to be so on the face of their proceedings." This rule, declared more than a century ago—1774—has been generally recognized in the Courts of America as well as those of England.

² *Coffin v. Fields*, 7 Cush. 358. "It is well settled that a party who justifies the taking of another's property under legal authority or process, must show that he has acted in strict conformity with the requirements of the law; otherwise, he will be considered a trespasser *ab initio*, and liable to an action of trespass at common law."

Purrrington v. Loring, 7 Mass. 388; *Gilmore v. Holt*, 4 Pick. 263; *Adams v. Adams*, 13 Pick. 387; *Smith v. Gates*, 21 Pick. 55; *Clark v. Lewis*, 34 Ill. 417; *Merritt v. O'Neal*, 13 Johns. 477; *Colden v. Eldred*, 15 Johns. 220.

³ *Clark v. Lewis*, 34 Ill. 421. "Under this ordinance, the pound-master could have no authority to act, unless the animal was running at large. If it was not running at large when taken up, he became a trespasser. Were he to impound an animal not subject to such a proceeding, the act being unauthorized and illegal, a purchaser, at his sale, would acquire no title to the property. Having no right to sell, he could confer no title to the purchaser." The mere fact that he is such officer does not constitute a justification for seizing or selling property, but the authority to do so must be shown.

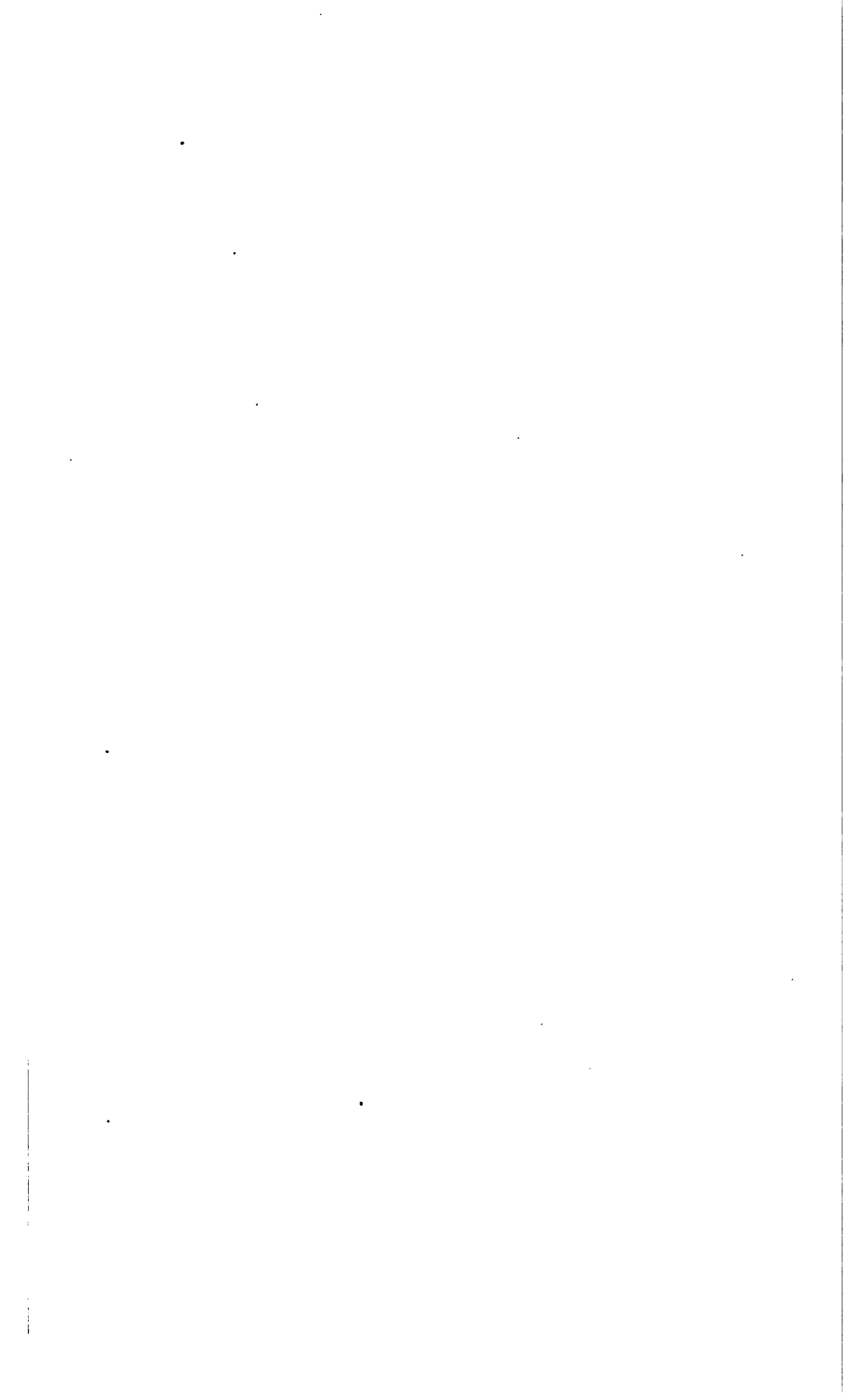
It is true that, in *Pickard v. Howe*, 12 Metc. 198, it was held that "a notice, given by a field driver to the owner of the cattle, that they are going at large

Purchasers at pound sales must be prepared to submit to the same rule as the officer who takes the animal. The mere fact that the pound-master, or other officer empowered to make such sales, has sold the animals, is not even *prima facie* evidence that his proceedings have been regular in taking the animals, giving requisite notice, and making the sale; and the purchaser is therefore subjected to the inconvenience of being always prepared to show strict compliance with the provisions of the statute by the officer who has made the sale.

on the public highway, is *prima facie* evidence that they were so at large, and puts on the owner the burden of proving the contrary"; but the further reasoning in the later case above cited, *Clark v. Lewis*, comparing the purchaser of animals at a pound sale with him who buys property at a sale by the sheriff, under execution, appears difficult to avoid. The sheriff's sale must be sustained by the judgment, execution, and due proceedings thereunder. Conceding, however, that the service of the notice upon the owner of the cattle does throw upon the owner the burden of proof to negative the assumption that the animals were liable to seizure, still the purchaser must be prepared to sustain the *prima facie* case made by the service of the notice, and, at all events, he must be prepared to make the same defense as the officer by showing strict compliance with the requirements of the law.

Part IV.

PERSONAL RELATIONS.



CHAPTER XXIII.

MASTER AND SERVANT.

- § 249. The relation of master and servant.
- § 250. The master should guard against personal injury of servant.
- § 251. The master no insurer of servant's life or health.
- § 252. The master may regulate hours of labor.
- § 253. Servant must obtain master's leave to absent himself.
- § 254. Servant bound for term of service agreed upon.
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- § 256. By misconduct, servant warrants his discharge without pay.
- § 257. Misconduct, to warrant discharge without pay, must be serious.
- § 258. Master must pay for term agreed upon, when.
- § 259. The contract for payment of wages.
- § 260. If the servant fall sick or become disabled.
- § 261. The master has a charge of the servant's health.
- § 262. Master not bound to give a "character."
- § 263. Damages for enticing away servant.
- § 264. Liability of master on contracts by servant.
- § 265. The master's liability for injuries by servant.
- § 266. The master's responsibility ends, when.
- § 267. Servant should reimburse master for losses.

§ 249. The relation of master and servant is that, by contract, the one is bound to render service, and the other to pay the stipulated consideration or price therefor. On the part of the person employed, if it be for such service as demands special skill or peculiar information, he covenants that he is possessed of, and in his employer's service will properly use, such skill or aptitude as the circumstances and requirements of his employment demand. The servant is also bound to be diligent and attentive to the duties of his service, and habitual neglect or absence, occasioning loss or injury to the master, will justify a dismissal, although it be neither willful nor contumacious.¹

The contract by the servant is to obey all proper and reasonable commands, in the line of his employment, given to him by his employer; if, therefore, such a command be disobeyed or

¹ 2 Kent's Com. 258; 2 Story on Contracts, Sec. 962.

willfully neglected, it is, on the part of the employee, a breach of the contract, for which he may be discharged, or held liable for damages, or both. But the command must be just and reasonable, and within the fair scope of the employment, and the servant is not held to the performance of a service in which there is personal risk or danger to himself, and he may reasonably decline to take any risk of personal injury or pecuniary responsibility.¹

§ 250. The master must guard against personal injury of servant.—It is the duty of the master not only to properly provide for his servant the necessary food and sleeping-place to keep him in good health, but he also has such a charge over his safety that he is bound to protect him from accidents by such means as an ordinarily prudent man would avail himself of for that purpose.

It is not the business of the servant to know, nor has he always the means of ascertaining, whether animals intrusted to his care are vicious or gentle, or whether farming or threshing machinery with which he is employed is in a condition safely to be used—certainly not at the commencement of the employment, and before the servant has had fitting opportunity to inform himself in the premises.

Even where the servant has, by handling and use, familiarized himself with the habits and condition of the animals and machinery, it may well be doubted whether the responsibility of deciding whether they shall be handled or used does not rest with the master.²

¹ *Priestly v. Fowler*, 3 Mee. & Wels. R. G. But mere inconvenience to the employee does not justify him in refusing obedience to a command in itself reasonable and proper; and in a case where the master directed his servant to lead some horses to a marsh which was a mile distant, and it was the servant's dinner hour, and, his dinner being ready, he refused to go until after he had dined, it was held to be no such unreasonable demand—that he should go at once, even at the sacrifice of his meal—as justified a refusal. (*Spain v. Arnott*, 2 Stark. 256; *Read v. Dansmore*, 9 Car. & Payne, 588.)

² *Porter v. Hannibal & St. J. R. R. Co.* 60 Mo. 160. "The fact that a servant, by the exercise of ordinary diligence, could have known of the defects in the machinery provided for his use by the master, will not bar a recovery against the master for injuries to the servant occasioned by such defects."

"It is not the business of the servant, nor has he the means of ascertaining, whether the machinery or structure upon which he is employed to operate is

The general rule applicable in the premises appears to be, where injuries to a servant are owing to improper appliances to do the work, or imperfections in such appliances or machinery used in the prosecution of the work, the condition of which, by reasonable and ordinary care and prudence, the master might know, and not to the lack of care or prudence of the servant, the master would be liable. That the legal implication is that the master will adopt suitable instruments and means with which to carry on his business, and if he fail to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he should be held responsible.

§ 251. The master not insurer of servant's life or health—The master, however, does not become an insurer or guarantor of the life or health of the servant, nor covenant to guard him against all accidents. The contract of employment is made in view of, and with reference to, the proposition that the servant is a rational creature, capable of judging and acting with reference to his own safety. The contract being made upon that hypothesis, the owner may rely, to the extent of the exercise of ordinary prudence, and the exercise of reasonable care against danger from the vices of animals, or the use of defective machinery, when the danger is obvious, or where the employee, by the exercise of reasonable care, might have obtained knowledge of it. It is only where the master has knowledge, or, under the circumstances, ought to have knowledge, of latent risks of which the employee has no knowledge, or obvious means of knowledge, that the employer is liable to his servant for injuries caused by such risks. If both were cognizant of the risk, there can be no recovery by the servant against the master. Nothing in the ordinary contract for labor would justify the servant in assuming risk to his life or health, upon the responsibility of the master; and if the contract were extraordinary, in that the risk was contemplated, there would either be

defective. It is the duty of the employer to furnish these appliances, and if he fails to do so he is responsible for injuries resulting from defective machinery." (Ibid; *Gibson v. P. R. R. Co.* 46 Mo. 163; *Harper v. R. R. Co.* 47 Mo. 367; *Shearman & Red. on Neg.* 102; *Brothers v. Cartter*, 52 Mo. 375.)

no guarantee against it, or a special one in the agreement of hire.

If neither knew of the risk, and it was existent, the owner is liable, when, by ordinary prudence and inquiry, he might have become aware of it; but the servant cannot willfully or negligently close his eyes to palpable danger, and hold the employer liable for results to him from it. He must use such care, under the circumstances, as a man of ordinary prudence would do about his own business; and if, by the exercise of such care, the accident could have been avoided by the servant, the master is not liable.¹

§ 252. The master may regulate the time for commencement of and quitting work, due regard being had to the customary hours for labor and season of the year;² the contract to labor is always made, however, with reference to the employment, and the master is not justified in such unreason-

¹ *Porter v. Hannibal & St. J. R. R. Co.* May, 1875, 60 Mo. 100, states the proposition broadly, that the fact that the servant could, by the exercise of ordinary diligence, have become aware of, and guarded himself from, danger, does not relieve the master from liability.

There is an apparent conflict between this case and the one of *Wag v. R. R. Co.* decided at April, 1875, Term of Supreme Court of Illinois, in which it was held that "where an employee, by the exercise of reasonable care, might have knowledge of imperfections in machinery about which he is employed, and continues in his master's service without objection, he cannot sustain an action for an injury caused by such imperfection."

The rule, as given in the latter case, seems the one most in consonance with the spirit of the bulk of the decisions. The Courts have not gone to the length of making the master an insurer of the servant against injury from the indicated cause. If the owner know of the danger, or, under the circumstances, ought to have been aware of it, and fail to inform the servant, he is liable; but if both be cognizant of the risk, there can be no recovery; and so it is if neither knew of it, unless, by ordinary care and caution, the employer might have known of it. And, on the other hand, the servant has no right to charge the master with the consequences of his own heedlessness, if, under the circumstances, a man of ordinary care and prudence, occupying the same position, ought to have taken notice of the risk. (*Gibson v. R. R. Co.* 46 Mo. 163; *Paulmier v. R. R. Co.* 34 N. J. 151; *Devitt v. R. R. Co.* 50 Mo. 302; *R. R. Co. v. Barbour*, 5 Ohio St. 541; *Kroy v. R. R. Co.* 32 Iowa, 357; *Davis v. R. R. Co.* 20 Mich. 105; *Thayer v. R. R. Co.* 22 Ind. 26; *Frazier v. R. R. Co.* 38 Penn. St. 104; *R. R. Co. v. Love*, 10 Ind. 556; *Wharton on Negligence*, 217; *Shearman & Redfield on Negligence*, 87, 94; *Addison on Torts*, 397; *McGlyn v. Broderic*, 31 Cal. 376; *Huddleston v. Lowell M. S. Co.* 106 Mass. 382.)

² *Turner v. Mason*, 14 Mees. & Welsb. 112. "Prima facie, the master is to regulate the time when his servant is to go out from and return to his home."

able demands as to work-hours as could not reasonably be supposed to have been understood by the employed by the hirer at the time when the contract was made, inasmuch as there can have been no contract unless the minds of both parties have met upon a fair, mutual understanding of the agreement entered upon.¹

§ 253. The servant can only leave home with the master's consent.—The servant is not permitted to be the judge of when he may be required; his contract is generally to give his time absolutely to his employer, and hence he should not assume that he may properly absent himself from his employer's premises, or go about without leave of absence, except under extraordinary circumstances, as where there is an infectious disease in the house or immediate neighborhood,² or where he reasonably apprehends danger to himself, or violence to his person, from the master; and if the servant ask for and fail to obtain leave of absence, it is not a justification of his taking leave that he provide another person, in his absence, to do his work.³ But a trivial assumption of authority in that respect, and where the absence of the employee worked no injury to the master, has been held excusable.⁴

§ 254. The servant is bound for the full term agreed upon.—As to the term of service, the general rule is that a servant is bound to perform the service according to his agreement. If the agreement, therefore, be for a definite term, he must serve throughout the whole of it, and he is not justified in quitting before rendering the full and entire service which he has contracted to perform. He must serve the whole term, or he will be entitled to no part of his wages. This rule remains in force, even where—an entire term being stipulated for—the amount of compensation agreed upon is at a specified rate for

¹ 1 Parsons on Contracts, p. 8. "The essentials of a legal contract are: thirdly, the assent of the parties, without which there is in law no contract." (Ibid, 475.) "There is no contract unless the parties thereto assent to the same thing in the same sense."

² Turner v. Mason, 14 Mees. & Welsb. 112.

³ Ibid.

⁴ Callo v. Brouncker, 4 Car. & Payne, 518; Cassons v. Skinner, 11 Mees. & Welsb. 161.

aliquot parts of that term, or is payable in installments at certain dates which are to occur during the term; as where the employment was for a year at a specified rate of wages by the month, week, or day, payable at stipulated times, the servant having agreed to work a year, such an arrangement for payment being perfectly consistent with the general terms of the contract.¹

§ 255. Sickness or disability of servant ends the engagement, and the master must pay for the service rendered. The contract between master and servant is subject to the vicissitudes of life and health, and if it should occur that a servant dies within the term, his personal representative would be entitled to receive from his employer payment for the service actually rendered, what it was reasonably worth, and the rate stipulated for the whole term might be regarded as a means of ascertaining the amount due, as a pro rata compensation for the

¹ Story on Contracts, Sec. 962; *Hawkins v. Gilbert*, 19 Ala. 54; *Olmstead v. Beale*, 19 Pick. 528. "If the plaintiff, having agreed to work for the defendant for a definite period, voluntarily leaves the defendant's service without any fault on the part of the defendant, and without his consent, before the expiration of the term, he cannot recover either on the express contract or on a *quantum meruit* for the labor actually performed by him." (*Faxon v. Mansfield*, 2 Mass. 147; *Taft v. Montague*, 14 Mass. 282; *Phelps v. Sheldon*, 13 Pick. 50; *Stark v. Parker*, 2 Pick. 267; *Thayer v. Wadsworth*, 19 Pick. 349; *Marsh v. Ruleson*, 1 Wend. 514; *Jennings v. Camp*, 13 Johns. 94; *McMillan v. Vanderlip*, 12 Ibid. 165; *Reab v. Moore*, 19 Ibid. 337; *Lantry v. Parks*, 8 Cowen, 63; *St. A. Str. v. Wilkins*, 8 Vt. 54; *Davis v. Maxwell*, 12 Met. 286; *Robinson v. Hall*, 3 Ibid. 301; *Wenn v. Southgate*, 17 Vt. 355; *Hunt v. Otis Co.* 4 Met. 465; *Spain v. Arnott*, 2 Stark. 256; *Lilley v. Elwin*, 11 Q. B. 755; *Swift v. Williams*, 2 Carter, 365.)

Beach v. Mullin, 34 N. J. Law, 343; *Ibid.*, 344. "The entirety of a contract does not depend upon its subject-matter. An entire contract is one the consideration of which is entire on both sides. Whenever there is a contract to pay a gross sum for a certain definite consideration, the contract is entire, and not apportionable either in law or equity." (Story on Contracts, Sec. 22.) "A contract to pay sixteen dollars for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel, or for a specified number of chattels."

In this suit, a claim was made for services. The contract was for one month's services, as a domestic in a family, from July 19th to August 19th, at sixteen dollars per month. For good cause, the plaintiff was discharged on the 14th of August, and sued for her wages. The ruling of the Court of last resort was, and the decision was as above stated, to the effect that the contract was entire, and, to recover, the plaintiff must show her ability and willingness properly to carry out the contract; that it was entire, and not severable, and that the hiring was for a month, and not such part of a month as the servant might choose to work.

service rendered, although that would not properly be deemed an arbitrary mode of ascertaining it, as it might well occur that the service throughout the term would be of greater comparative value than for a portion of it; and, on the other hand, it might be that the months for which service was rendered had a general price and value for service, higher than those of the term which remained; and so if the servant be injured, meet with an accident, or become sick or disabled from performing the service, a like rule applies, and he may recover for the portion of the term he has actually served, as the disability is from no violation or fault of his,¹ unless it should appear, from the peculiar circumstances of the case, that the *entire* performance constituted the consideration of the contract.²

¹ *Fenton v. Clark*, 11 Vermont, 557, 560. "The position that, if A contract with B to labor for him a given time and for a stated consideration, and A voluntarily leaves the service of B before the expiration of the time, there can be no recovery, is sustained by numerous adjudged cases. There can be no recovery in such case upon a *quantum meruit*, it is said, because the contract is entire, and its performance is a condition precedent." But "in cases where the act of God renders the performance absolutely impossible, the contract is discharged, according to the maxim, '*impotentia excusat legem*.'" And upon this reasoning it was held, that upon this contract to work four specified months, and receive no pay till he had worked the four months, "still, if he is prevented from completing the four months' labor by reason of sickness, he may recover pro rata for the services upon a *quantum meruit*."

Dickey v. Linscott, 20 Me. 453. Where a party agreed to work for another on his farm for seven months, as a farm-hand, at \$13 per month, and in making the contract it was estimated that this service would extend through haying-time, but the workman fell sick, it was held that, in a contract for the performance of manual labor for a stipulated time, requiring strength and health, it must be understood to be subject to the implied condition that strength and health remain. An actual inability to perform the labor, arising from sickness at the commencement of the time, although it may not continue during the whole term contracted for, excuses the performance."

Naterston v. Ship Hazard, Bee. R. 441; *Fuller v. Brown*, 11 Met. 440; *Shearer v. Morse*, 20 Vt. 620. But, from the application of principles, it results that these enumerated causes, excusing the enforcement of a rule, are exceptional, and he who relies upon the exception must take the affirmative thereon, and make a case fairly within the exception, in good faith.

² 1 Story on Contracts, Sec. 962; *Cutter v. Powell*, 6 T. R. 320. And so, also, it has been held, an infant may avoid his contract and recover upon a *quantum meruit*, if, upon taking into consideration all the circumstances, his services appear to be worth anything. (1 Story on Contracts, Sec. 692; *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Pick. 572; *Whitmarsh v. Hall*, 3 Denio, 375; *Medbury v. Watson*, 7 Hill, 110; *Judkins v. Walker*, 17 Me. 38; *Bishop v. Shepherd*, 23 Pick. 492; *Thomas v. Dyke*, 11 Vt. 273; *Corpe v. Overton*, 10 Bing. 252; *Moulton v. Trask*, 9 Met. 557.)

§ 256. **By misconduct, the servant warrants his discharge without payment.**—If a just and reasonable command of the employer, within the scope of the employment, be disobeyed by the servant willfully, or he be habitually negligent in the discharge of his duties, so that he cause thereby injury or loss to his master, although, in so acting, the servant is neither contumacious, nor intends to cause damage by his conduct, the master may dismiss him, and he is not bound to pay for such service as may have been rendered by the servant. His contract is to perform, faithfully, the service for which he is engaged, and not only the master, but the public at large, is interested; inasmuch as it is important that the use of capital, in such manner as to employ the labor of those who have but that to live upon, should be encouraged; and no penalty can be devised so efficient to induce the fulfillment of his part of the contract by the laborer as the loss of his wages.

If the conduct of the servant is immoral, indecent, or in any manner dishonest in relation to his master's business, or if he be guilty of any criminal offense against the law, though not injurious to his master's interests, or if he use abusive language against his master, or quarrel with his fellow-servant, or in any manner abuse his position to injure his master, he may, by the master, be dismissed; and such dismissal is of the same effect as though he voluntarily left unfulfilled the term of service for which he had contracted, and he ought not to be permitted to recover on *quantum meruit* for the portion of the term which he has served. The termination of the service, the breach of the contract, is ascribable to the servant's conduct, and he cannot compel his discharge, and claim the benefit of it.¹

¹ 1 Story on Contracts, 962, q, r, and s; *Cussons v. Skinner*, 11 Mees. & Welsb. 161; *Arding v. Lomax*, 28 Eng. Law and Eq. 543, in which it was held that if a servant agrees to use his best endeavors to promote his master's interests, a neglect to do so is a good cause for dismissal. So in *Robinson v. Hindman*, 3 Esp. 235, which was an action for a month's wages by a servant against his employer, on the ground that he had been discharged without warning; and, in defense, the employer showed that plaintiff had been negligent in his conduct, frequently absent when needed by his master, and that, contrary to the natural requirements of the service for which he had engaged, he often had slept out of his employer's house of nights; it was held that he could not recover because of his misconduct. To same effect, see *Callo v. Brounacker*, 4 Car. & Payne, 518; *Baillie v. Kell*, 4 Bing. N. C. 638; *Turner v. Robinson*, 6 Car. & Payne, 15; *Libhart v. Wood*, 1 Watts & Serg. 265; *Acton v. Atkin*, 4 Car. & Payne, 208; *Keamer v. Holmes*, 6 La. An. 373; *Byrd v. Boyd*, 4 McCord, 246.

§ 257. Misconduct, to warrant discharge without pay, must be serious.—The disobedience, or misconduct in other respects, must be serious, and of a character so grave as to render submission thereto practically inconsistent with the continued existence of the relation, between the parties, of master and servant; a trivial disobedience, or a temporary absence from his duties by the servant, or occasional sulkiness and insolence of manner, not amounting to positive breaking of the contract of service, have been held insufficient to justify a dismissal.¹

§ 258. Master must pay for term agreed on, when.—The duties of the master toward his servant are such that he must, if the contract be for a term, pay for the whole of it, unless, voluntarily or by his misconduct, the servant annul the contract; unless the master, having broken the contract, can show that the servant entered into other employment, and so did not lose his time by the breach, as it could not reasonably be claimed by the servant that he should be paid twice for the employment of the same time.

There appears to be a distinction, in this respect, between the rights of the parties to terminate the relation, and the reason for the distinction becomes obvious upon consideration.

The whole capital employed by the servant is his labor. If, at the wages agreed upon, he is immediately employed by another person, it is impossible that he should be injured by his discharge; and the breaking of the contract by the master must be *damnum absque injuria* as to the servant, while it by no means results that, if the employee leaves his master's work, the only loss to the employer will be the deprivation of the service—the mere loss to him of the servant's time. Serious annoyance, and loss to him whose capital is employed in the business for which the servant is hired, is liable almost inevitably to result from interruption of the labor; even if a new man is obtainable at once, some derangement of the work almost

¹ 1 Story on Contracts, Sec. 962p; *Callo v. Brounacker*, 4 Car. & Payne, 518; *Fellicul v. Armstrong*, 7 Adolph. & Ell. 557; *Regina v. Stoke*, 5 Adolph. & Ell. 303; *Cussons v. Skinner*, 11 Mees. & Welsb. 161; *Rex v. Sharrington*, 4 Doug. 11; *Chandler v. Grieves*, 2 H. Blackst. 606n; *Rex v. Inslip*, 1 Strange, 423; *Same v. Polesworth*, 2 Barn. & Ald. 483; *Same v. Stoke*, 5 Adolph. & Ell. (N. S.) 303.

necessarily results in accustoming him to it, and if the place made vacant by the servant's quitting cannot be promptly filled, very serious injury may result to the employer.

Unless stipulated wages are agreed upon, the master is bound to pay what the service is reasonably worth, and the usual and most proper way to ascertain that value is to measure it by the current wages for similar service in the immediate neighborhood.¹

§ 259. The contract for the payment of wages by the master to the servant is governed by the general law of contracts. The consideration which sustains the contract is the mutual promises of the parties, each to the other. The promise of the employee is that he will perform the stipulated labor; that of the employer, that he will pay the price therefor.

Among the general rules governing contracts is found, as well sustained as any, that mutual promises are sufficient to sustain a contract, and the instance of master and servant is not unfrequently cited to illustrate the rule.

§ 260. If the servant fall sick, or become disabled, during the service, the master is not entitled to deduct from his wages for the time during which he is thereby incapacitated from performing his work.²

The master is not compelled to provide medical attendance for his servant when he is taken ill, or to furnish medicines for him; and if he do so, upon his own authority or judgment, without the servant's request, he cannot deduct the cost thereof from wages due to the servant; but he must furnish to the servant, while he is ill, proper food.³

¹ 1 Story on Contracts, 962 h; *Costigan v. M. & H. R. R. Co.* 2 Denio, 612; *Hoyt v. Wildfire*, 3 Johns. 518; *Ward v. Hines*, 9 Johns. 138; *Emerson v. Howland*, 1 Mason, 51.

² *Rex v. Winterset*, Cald. 300; *Same v. Sudbrooke*, 1 Smith, 59; *Chandler v. Grieves*, 2 H. Black. 606 n; *Nichols v. Coolahan*, 10 Metc. 449; *Dickey v. Linscott*, 20 Me. 453; *Seaver v. Morse*, 20 Vt. 620; *Fuller v. Brown*, 11 Metc. 440; *Fenton v. Clark*, 11 Vt. 557; 1 Story on Cont. 962 j.

³ *Wennal v. Adney*, 3 Bos. & Pul. 247; *Seller v. Norman*, 4 Car. & Payne, 80; *Cooper v. Phillips*, 4 Car. & Payne, 581; *Regina v. Smith*, 8 Car. & Payne, 153; *Denbar v. Williams*, 10 Johns. 249; *Gibbons on the Law of Contracts etc.* Sec. 69; *Emmons v. Lord*, 18 Me. 351; 1 Story on Cont. 962 j, k.

§ 261. The master has a charge of the health of the servant peculiar to the relation between them. He must, therefore, refrain from exposing him to needless or extraordinary risks, and he should take of his employee the same care which he might reasonably be expected to take of himself; but he is not responsible for an accident to the servant, unless he knows of the danger incurred and the servant does not, and he incurs no responsibility from possible injury to the servant so long as he provides for his safety to the best of his judgment.¹

§ 262. Master not bound to give a "character" at end of term.—The master, at the termination of the service, may or may not, at his option, "give a character" to the servant; but if he do so, and misstate the servant's character, maliciously and wantonly, he will be liable for damages. But the burden of proving malice is upon the servant, as the master may speak of the servant disparagingly, and say things which will be prejudicial to him, without making himself liable, unless his statements can be proved not only to be false, but malicious, as it is to be presumed that he states what he believes to be true, and the burden is upon the servant to prove that he has spoken falsely and maliciously.²

§ 263. For enticing the servant away from his master, or for harboring him when it is known that he is breaking a contract to labor by leaving his master's premises, the common law gives a right of action, notwithstanding the cause of action springs from a breach of contract to which the enticer or harborer is not a party; and an action will also lie at common law for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only *in fieri*, provided the procurement be during the subsistence of the contract and produces damage; and to sustain such action, it is not necessary that the employer

¹ 1 Story on Cont. 962 l; Priestly v. Fowler, 3 Mees. & Wels. 1; Walker v. Bolling, 22 Ala. 294; Brown v. Maxwell, 6 Hill, 594; Wigmore v. Jay, 5 Exch. 354; Sherman v. Rochester & S. R. R. 15 Barb. 574.

² Rogers v. Clifton, 3 Bos. & Pul. 591; Edmonson v. Stephenson, Bull. N. P. R. 8; Weatherston v. Hawkins, 1 T. R. 110; Story on Contracts, Sec. 962 m.

and employed should stand in the strict relation of master and servant; so that it would, from the best considered cases, appear that under this common-law rule an action for damages will lie for the malicious procurement of the breach of any contract, though not strictly for personal services, if by the procurement damage was intended, and did result to the plaintiff.¹

But the mere attempt to entice a servant away would not be actionable for want of damage; nor will the action lie after a composition by the master with the servant for the breach of the contract. To induce a servant to leave the master at the end of the stipulated term, is not actionable; it tends to no breach of a contract, but only to prevent one which might hereafter be made.²

§ 264. The master is liable on the servant's contracts made in the usual course of the employment by the latter for and in the name of the master, but the contract so made, to be made binding on the principal, must be such as the usual employment of the servant would justify a reasonable and prudent person in believing the servant to have been, by the master, clothed with authority to act for him in the premises. Thus, a servant who is engaged in work about the house, and who is in the habit of purchasing the family supplies, might buy such supplies in the name of the master, and the latter would be compelled to pay for them, even if the servant had no order to buy, or was, in so doing, defrauding and obtaining goods for himself; but if his usual employment is upon farm work, and not connected with household work, and he had never been permitted by the master to make purchases, he could not bind the master by going to the store and buying goods, simply by being the servant and pretending to have authority.³

Where a servant is employed for the general conduct of any business, and has no particular orders with reference to the

¹ 3 Bl. Com. 142; *Lumley v. Gye*, 2 Ell. & Bl. 216; *Blake v. Lanyon*, 6 T. R. 221; *Adams v. Bafeald*, 1 Leon. 240; *Sykes v. Dixon*, 9 A. & E. 693; *Tarlton v. McGawley*, 1 Peake's N. P. C. 207; *Pilkington v. Scott*, 15 M. & W. 657; *Hartly v. Cummings*, 5 Com. B. 247; (E. C. L. R. 57); *Haight v. Badgley*, 15 Barb. 499.

² *Campbell v. Cooper*, 34 N. H. 49; 2 Kent's Com. 258.

³ A servant sent, without money, to buy goods, has implied authority to pledge his master's credit. (*Tobin v. Crawford*, 9 M. & W. 718; *Weisgar v. Graham*, 3 Bibb, 313.)

manner in which that business is to be transacted, he is considered as invested with all the authority necessary for properly conducting it. The employment is deemed to be characterized by the delegation of power to represent the master to the extent of properly doing the work, and the authority to do the business embraces the appropriate means to accomplish the desired end.¹

§ 265. The master is liable for injuries committed by a servant, whether such occur through the servant's negligence, fraud, deceit, or even willful misconduct, so long as it is done in the course of his employment; and it makes no difference that the master did not authorize, or even know of, the servant's act or neglect. Even if the servant, in the commission of the act, has willfully violated the orders of his master, the latter must still be held answerable so long as the servant commits the act in the usual course of his employment;² and this liability is not confined to those who work under the immediate supervision of the master, but extends to all others whom he selects to do any work or superintend any business for him.³

§ 266. The master's responsibility ends when the person employed so far exceeds the limits of his instructions as to cease to be acting under the direction of his employer.

The theory, on which the master is held liable for injuries by his servant, is that he who employs another to do an act assumes the consequences, and that the servant is but an agent, his acts being those of his principal.

But this responsibility extends no further than to such acts as occur while the servant is engaged on the master's work, or

¹ "The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master." (2 Kent's Com. 269; 1 Parsons on Contracts, 101-9.)

² R. R. Co. v. Dickson, 63 Ill. 151; Knight v. Luce, 116 Mass. 588; Schouler's Dom. Rel. 636-7; Story on Agency, 452; Smith's Mast. & Servt. 151-2; Shear. & Red. on Neg. 65. The agents and servants of a railroad company, while engaged in running a train of cars, are in the line of their duty, and for their acts, willfully done while so engaged, the company is liable. (R. R. Co. v. Graham, 66 Ind. 239.)

³ Rex v. Hoseason, 14 East, 605; Sangher v. Pointer, 5 B. & C. 554; Wayland v. Elkins, 1 Stark. 272.

in matters directly connected with the business on which he is engaged.

The master is not to be deemed one who guarantees to the community the virtue of his servants, or is to be held for their misconduct apart from or to the extent of the fair application of the maxim *qui facit per alium facit per se*, and it is only upon the hypothesis that, where the servant is engaged upon the master's work, he is the representative of such master, and his acts are those of his employer. Hence, it results that if a third party knows of instructions from the master to the servant, which the latter is violating, such person cannot charge the master for loss or injury which results from breach of contract by the servant when so disobeying instructions, because he becomes aware that the servant no longer represents the will of the master. And in matters of injury by the servant, beyond the scope of his authority, he is as much a stranger to his master as any other person, and, to fasten the responsibility on the master, the primary fact that the servant was acting within the limits of his employment must be shown.¹

§ 267. The servant must reimburse his master when the negligence or willful misconduct of the former has been

¹ *Knight v. Luce*, 116 Mass. 586. "On the issue whether a person employed to burn brush upon the land of another had authority also to burn the brush within the limits of the highway adjoining, from which it was separated by a wall, the question whether a direction by the owner to clear up the land included land within the limits of the highway is for the jury, although the estate of the owner extended to the middle of the road."

This was a case where a person was employed to clear up land adjoining a road. He cleared a little outside of the stone fence, and burned in the road. Plaintiff's horse was frightened, ran away, and plaintiff was thrown from the wagon and hurt. For his injuries, he sued the master, who defended on the ground that the employment was to "clear up the land within the lot," and not the road. The jury returned a verdict in favor of defendant, which, on appeal, was affirmed.

So in *Wilson v. Peverly*, 2 N. H. 548, where a servant was employed to harrow in one field and watch a fire in another. He undertook to do more, and set fire to a pile of rubbish, and, from this last, fire escaped and burned plaintiff's property. In the action for damages against the master, he was held harmless, the Court giving the rule: "Where a servant acts under the special orders of his master, the master is not liable for his negligence in doing business not ordered." (*McManus v. Crickett*, 8 D. & R. 533; *Smith's Mast. & Servt.* 160; *Shaw v. Reed*, 9 W. & S. 72; *Harris & Mabry*, 1 Ired. 240; *Foster v. Essex Bk.* 17 Mass. 500; *Lyons v. Martin*, 8 Ad. & El. 512; *McKenzie v. McLeod*, 10 Bing. 385; *Stevens v. Armstrong*, 7 N. Y. 435.)

visited upon the latter, at the suit of a third party injured. The primary liability which renders the master liable for injuries resulting from the servant's failure to exercise due care, or for his willful misconduct, is to the public, while, as between the parties, the contract is to perform the service in a careful manner and with requisite skill.

Through a breach in this contract alone can the employer be reached in an action for damages by a third party, and the measure of the recovery against the servant, to which the master is entitled, is naturally the judgment which he has been compelled to satisfy, with costs, and such reasonable counsel fees as he has paid or become chargeable with.

In the matter of defending the suit brought by the person injured, and in incurring the expense of counsel fees, the servant should be consulted by the master, and if he choose to do so, he may assume such control of the case as to insure him a fair hearing upon the question of neglect or misconduct, this right being subject to and in consonance with that of the master, to use proper means to avoid judgment being taken against him.¹

¹ "A servant is liable to an action at the suit of his master, when a third person has brought an action and recovered damages against the master, for injuries sustained in consequence of the servant's negligence or misconduct."

"The servant is liable for the costs and counsel fees in such suit, incurred in the defense, he having been notified of its pendency, and having requested his master to defend." (*R. R. Co. v. Latham*, 63 Me. 177.)

CHAPTER XXIV.

FACTORS AND BROKERS.

- § 268. A factor differs from a broker.
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- § 272. Implied warranty of title, vendor to broker.
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- § 284. Factor must obey consignee's orders.
- § 285. Purchase by factor of goods consigned to him.
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- § 287. Objections to employment of "middle-men."
- § 288. Farmer may sell produce without license.

§ 268. A factor differs from a broker materially, in respect to the duties and responsibilities of his position, and his power with reference to the business of the principal.

A broker buys and sells in the name of his principal; he is a special agent, employed to make bargains and contracts between other persons, receiving, as a general thing, his remuneration by means of a commission. He is merely a negotiator between the other parties, and acts in the name only of his employer; the property, which he is employed to buy and sell, is not intrusted to his custody or possession, and he is not authorized to buy and sell it in his own name.¹

¹ 1 Bouvier's Law Dic. "Brokers"; Dunlap's Paley on Agency, Sec. 13; Story on Agency, Sec. 34. "A factor differs from a broker in some important particulars. A factor may buy and sell in his own name, as well as in the name of his principal. A broker is always bound to sell in the name of his principal. A factor is intrusted with the possession, management, control, and disposal of

§ 269. Sold note and bought note.—In making sales, the custom is for the broker to give to the buyer a memorandum of the transaction, which, in commercial parlance, is designated a "sold note," and to the seller a similar memorandum, which is called a "bought note"; in the transaction he is the agent of both parties, and they are respectively bound by his contract and his memoranda thereof; the bought and sold notes become the contract of the parties, provided the agent has acted fairly, and within the scope of his authority.¹

In signing the contract of purchase and sale, the broker's memorandum thereof, signed by him as the agent for both parties, is sufficient under the Statute of Frauds.²

§ 270. The broker is the agent of the seller in making the sale, and after it is closed, for certain purposes, becomes agent for the buyer. Although sometimes the agent for both parties, primarily the broker is agent only for the party who has employed him, and it is only when the bargain is completed that he becomes the agent of the other, and then only to the extent requisite to effectuate the purpose of his employment.¹

the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and, consequently, has no such special property or lien." (*Pickering v. Buak*, 15 East, 38, 43; *Coddington v. Goddard*, 82 Mass. [16 Gray] 436; *Baring v. Corrie*, 2 B. & Ald. 147.)

¹ *Story on Agency*, Sec. 28; *Hinckley v. Arey*, 27 Me. 362; *Rowe v. Stevens*, 53 N. Y. 621, in which, it appearing that, from the nature of the transaction and proceedings had, each party employed the broker, both were held liable to pay for his services.

The name of both buyer and seller should appear on the "bought" and "sold" notes. (*Champion v. Plumer*, 4 Bos. & Pull. 252; *Picks v. Hawkin*, 4 Esp. 114, 115.)

² *Rucker v. Cammeyer*, 1 Esp. 106; *Browne on Statute of Frauds*, Sec. 347. "It is clearly settled that the bought and sold notes together constitute a binding memorandum, though the broker make no entry in his book." (*Hawes v. Foster*, 1 Moo. & Rob. 368; *Hicks v. Hawkin*, 4 Ibid. 114; *Chapman v. Partridge*, 5 Ibid. 226; *Dickerson v. Lilwall*, 1 Stark. 128; *Soames v. Spencer*, 1 Dow. & Ry. 32; *Short v. Spackman*, 2 Barn. & Adol. 362; *Grant v. Fletcher*, 5 Barn. & Cress. 436.)

³ *Story on Agency*, Sec. 31. "It has already been suggested that a broker is, for some purposes, treated as the agent of both parties. But, primarily, he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitely settled, as to its terms, between the principals." (*Hinckley v. Arey*, 27 Me. 362.)

And it behooves the person dealing with a broker to guard against accepting service from him, in the premises, before the trade is closed, and, in all respects,

No power of substitution can be implied by the broker from the business being intrusted to him; it is the broker's individual capacity and probity which is relied upon, and he cannot ordinarily delegate his authority to a sub-agent, clerk, or other person, without the assent of his principal, either express, or properly implied from the circumstances.¹

§ 271. Real estate brokers—Their commissions are due, when.—The commissions of a real estate broker being the consideration upon which he renders service, and it being impossible for him to control the conduct of his employer in the matter of consummating sales to find arrearages for which the employment has been given and accepted, the law extends to the broker protection from the caprice of the vendor by allowing him the commission when it is earned, whether the sale is consummated or not.

If, through the agency of a real estate broker, a sale is effected, and if his communications with the purchaser are the means of bringing the parties together, and the sale results in consequence, the compensation is earned, even if at the sale the broker is not present; and the same rule applies where a broker is employed to purchase real estate.²

to treat the broker as the representative of the person who has employed him, to the extent of the employment only; for if the broker sells the property in his own name, without some special authority so to do, inasmuch as he exceeds his proper authority, the principal will have the same rights and remedies against the purchaser as if his name had been disclosed by the broker. (1871, *Graham v. Duckwall*, 8 Bush, [Ky.] 12.)

¹ Story on Agency, Sec. 29; *Ibid*, Sec. 109; *Henderson v. Barnwall*, 1 Y. & Jerv. 387; *Cockran v. Irlam*, 2 M. & S. 301; *Paley on Agency*, 241.

² *Lloyd v. Matthews*, 51 N. Y. 124. Brokers are entitled to commissions if the sales were made through their agency, as their procuring causes. So held in *Knap v. Wallace*, 41 N. Y. 477. "A real estate broker, employed to purchase real estate, earns his commission when he has, in good faith, brought to his employer a vendor, who makes a written contract with him for the sale of the property. It is no answer to his claim for commissions against such employer, that the vendor could not make a perfect title, and was therefore unable to carry out his contract of sale."

Redfield v. Legg, 38 *Ibid*, 212; *Moses v. Bierling*, 31 *Ibid*, 462; *Woods v. Stephens*, 46 Mo. 555; *Hogue v. O'Connor*, 1 Sweeny, (N. Y.) 472; 41 *How. Pr.* 287; *Smith v. Smith*, 1 Sweeny, (N. Y.) 552.

Phelan v. Gardner, 43 Cal. 306. "If the owner of land employs another person to sell for him his land at an agreed rate of commission, and the broker finds a purchaser who is willing to take the land at the price fixed, the owner cannot, by a refusal to sell to him or by a sale to another, avoid the contract and escape the payment of the commission." (*Blood v. Shanam*, 29 Cal. 333.)

But if, by the terms of his contract, the broker covenants to sell within a stated time at the price agreed upon, and time is made the important element of the employment, he receives the property only for the purpose and to the extent stipulated; hence, he has no lien or claim for brokerage after the time has expired, unless he has made the sale; and the owner of the land may, if he please, sell to a party who came to him at the solicitation of the broker, at a less price and free from the commission.¹

§ 272. Implied warranty of title by vendor to broker.—

The title of the vendor is not to be considered by the broker: he is to sell the land; to bring to the vendor a person able and willing to buy at the stipulated price; and if, when the sale is to be consummated, it appears that the title is so far defective as to defeat the sale, the vendor may be held to pay the commission, for the service has been rendered, the commission earned, and the defect in the title is the misfortune of him to whom the land belongs,² unless the broker, at the time of accepting the employment, knew of the defect.³

"The conditions precedent to a right to recover, in an action for brokerage, must be the original discovery of the purchaser; the starting of the negotiations by the broker, and a final closing of the bargain by or on behalf of the principal." (*Wallace v. Simpson*, New York Marine Court, General Term, July, 1875.)

¹ Where, by a contract with the owner of real estate, the broker is bound to sell at a given price and within a limited time, if he does not sell for that price and within that time the contract is at an end, and the owner may then sell the property to a purchaser procured by the broker at a less price and free from the broker's commission. (*Sattherthwaite v. Vreeland*, 48 How. Pr. R. 508.) This case, among the latest, appears to put the broker somewhat at the mercy of the vendor of real property, in that the latter might induce the broker to give his services in the hope to sell within the prescribed period at a price higher than the seller *hoped* to realize, and when he had brought the parties into communication, and the trade fell through because of the unreasonable price charged, the vendor would have but to allow the period of time to expire and then sell at the lower price, (which was his true one all the time) and defraud the broker. The case is in this connection at variance with the general tenor of decisions, but is supported measurably by *Jacobs v. Kolff*, 2 Hilton, 133; *Hooley v. Townsend*, 16 How. Pr. R. 125; *Barnard v. Mennott*, 33 Ibid, 440; *Doty v. Miller*, 43 Barb. 529; *Briggs v. Rowe*, 4 Keyes, 424.

These cases state the proposition that the relation is one of contract; that the vendor for the period limited, or for a reasonable time where no limit is designated, is to hold the land ready for sale at the designated price, but no further restricts him in the exercise of control over his property, and at the end of the time resumes the control absolutely.

² *Jones v. Adler*, 34 Md. 440; *Nesbit v. Helser*, 49 Mo. 383; *Middleton v. Findla*, 23 Cal. 76; *Ibid*, 81; *Case of The Monte Allegre*, 9 Wheat. 644.

³ *Toombs v. Alexander*, 101 Mass. 255; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Pans*, 52 Mo. 244.

So it has been held that where a broker acted for both parties in an exchange of property he might claim commissions from each.¹

If, after having employed a broker, the owner, without revoking the agency, make the sale, the commission is payable, or at all events half commission under local custom, or a ratable proportion of what his commission would have been.²

§ 273. Factors, their duties and powers.—A factor is distinguished from a *broker* by being intrusted with the possession and disposal of property intrusted to him for sale by him to whom the property belongs; the factor is clothed with such apparent ownership as enables him to deal with the property as his own; he may sell it in his own name, and the principal is bound by the sale as though he had made it himself, and it thence results that the factor may, in his own name, receive and receipt for payments.

The definition of the word "factor," most generally received, is: "An agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission."³ And this definition appears fully to serve its purpose; but the prevailing custom of compensation to factors being by commission upon sales made by them, while they are apparently dealing with their own property, has caused them to be more commonly known as commission merchants, where acting as *domestic* factors, and residing in the same country with their principals; and as consignees when living abroad, and engaged in the business of a foreign factor.⁴

¹ *Muller v. Kertzleb*, 7 Bush, (Ky.) 253; *Rupp v. Samson*, 86 Mass. 398. But see *Lloyd v. Colston*, 5 Bush, 587, in which the converse has been held.

² *Jones v. Adler*, 34 Md. 440; *Walton v. New Orleans*, 23 La. An. 398; *Martin v. Sillman*, 53 N. Y. 615.

"A real estate broker, who claims a commission on the sale of real estate, is entitled to the same, if he shows an employment, and that the sale was made by means of his efforts or agency. If the purchaser is found through the broker's instrumentality, he is entitled to his commission, although the owner negotiates the sale himself, and although the purchaser is not introduced to the owner by the broker, and the latter is not personally acquainted with the purchaser." (*Sussdorff v. Schmidt*, N. Y. Court of Appeals, August 1874; A. L. J. August 22d, 1874.)

³ 1 Bouv. Dic. 570; *Dunlap's Paley on Agency*, Sec. 13; *Story on Agency*, Secs. 33, 34, 111, 112; *Graham v. Duckwall*, 8 Bush. (Ky.) 12.

⁴ 1 Bouv. Dic. 570. "A domestic factor is one who resides in the same country

§ 274. A factor has a lien on goods consigned to him, for his general advances and his commissions; this lien attaches immediately upon the property coming into his possession.¹ The lien is not alone for the special advances made upon the identical shipment, but extends also to and protects the general balance remaining in his favor.² He is, for all practical purposes, to all the world except his principal, to be regarded as the owner of the property; he may insure it, both for the protection of his lien for advances and charges, to the extent of his interest and for his principal.³ He may sue in his own name for the price of goods sold by him for his principal, and of

with his principal. By the usages of trade, or intendment of law, when domestic factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit between the principal and the agent, and third persons, has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale, the buyer is responsible both to the factor and principal for the purchase-money, but this presumption may be rebutted by proof of exclusive credit." (Story Ag. 267, 291, 293; Paley on Agency, 243, 371; 9 Barn. & C. 78; 15 East, 62.)

"A foreign factor is one who resides in a different country from his principal. Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases, the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by the proof of a contrary agreement." (Story Ag. Sec. 268; Paley on Ag. 245, 373; Buller, Nisi P. 130.)

¹ "The question as to the precise time when the property may be said to vest in a factor who is consignee under liabilities in advance, properly falls under the law of shipping, and especially under the right of stoppage *in transitu*." (Story on Agency, Sec. 111, Note 3; Abbott on Shipp. p. 3, Chap. 9, Secs. 4-25; Holbrook v. Wright, 24 Wend. 169; Hall v. Smith, 1 Bos. & Pull. 563.)

Bailey v. B. R. R. Co. 49 N. Y. 70; Byers v. Danley, 27 Ark. 77. A mere consignment gives the factor no lien for advances on previous consignments, until such goods actually arrive and come into the factor's possession, and does not prevent the consignor from transferring the goods, while on the way, to a third person. (Bank of Rochester v. Jones, 4 N. Y. 497; Winter v. Coit, 7 N. Y. 288.)

² Knapp v. Alvord, 10 Paige, 105; Grieff v. Cowquill, 2 Cincinnati (Sup. Ct.) 58; 2 Disney, Ohio, 54. "The factor has his lien, not merely for a particular advance, but also for his general balance. He never loses his lien but by his own consent, or his neglect to enforce it, if it has been once legally vested." (Howe v. Whited, 21 La. An. 495.)

The lien of a factor for advances made prior to the levy of an attachment on the property, is superior to that of the attaching creditor. (Maxen v. Lamarum, 21 La. An. 366.)

³ Waters v. Monarch L. & F. Ins. Co. 34 Eng. Law & Eq. 116; Story's Ag. Sec. 111.

course may release debtors for and upon such transactions, unless so far as specially restricted by his principal.¹

§ 275. Foreign factors are generally treated as principals, whether they are known to be acting for others or not, so that exclusive credit is generally given by and to them; and they alone, therefore, are entitled to maintain actions on contracts arising in their conduct of the business.²

Domestic factors, by the usages of trade, and by custom having its origin in the convenience of the parties interested, are treated as principals, but not as exclusive principals, for the owner of the goods may sue or be sued on the contracts made by his factor, whether, in making the contract, the other party was or was not aware that the factor was acting as such for another person.³

§ 276. A factor *del credere* is one who, for an additional commission, or other consideration, in case of sale being made on credit, undertakes to guarantee to his principal the debt due by the buyer. A factor with a *del credere* commission is liable to the principal if the purchaser becomes insolvent, or fails to pay the debt; but the factor is not primarily the debtor, and before reaching the factor, the principal must make it appear that the buyer cannot be made to pay, and to that end, the principal may, in his own name, sue the buyer, notwithstanding the *del credere* commission.⁴

§ 277. Presumption of knowledge of consignor as to usages of trade.—In forwarding goods for sale to a factor

¹ Drinkwater v. Goodwin, Cowp. 254; Johnson v. Osborne, 11 Adolph. & Ellis, 549; Dunlap's Paley on Agency, 278, 285, 286.)

² Wilson v. Zuluetta, 14 Q. B. 405; 1 Liverm. on Agency, 226, 227; Story on Agency, Sec. 400.

³ Paley on Agency, 324, 361; Story on Agency, Sec. 400 et seq. The lien of a factor who has accepted a draft specifically payable out of the property of the drawer, in the hands of the factor, in favor of a creditor of the drawer, while the factor retains the custody of the property with the consent and as the mutual agent of both parties, drawer and payee, is paramount to that of any other creditor or purchaser from the owner. (Eaton v. Truesdill, 52 Ill. 307.)

⁴ Gale v. Comber, 7 Taunt. 558; Peele v. Northcote, Ibid, 478; Morris v. Cleasby, 4 M. & Selw. 566; Thompson v. Perkins, 3 Mason, 232; 2 Kent. Com. 624-5; Story on Agency, Sec. 215; Lewis v. Boheme, 33 Md. 412.

or commission merchant, the principal is presumed to intrust them to his agent for disposal, in conformity with established usages in the contemplated market, and to confer on him the means necessary and proper for the accomplishment of the purposes of the consignment, by the various means which are justified or allowed by the usages of trade, so that under an ordinary consignment, without special restriction, it will be understood that the factor may sell upon credit as well as for cash, to the extent justified by the usages of trade and for the usual period of time.

The principal is presumed to have authorized the agent to sell in the usual manner in which similar goods are disposed of in the special market.¹

§ 278. The factor may pledge goods consigned, when.—

The necessities of trade, which have given rise to the employment of factors, are such that certain expenses must necessarily be incurred by this agent of the seller; and in view of that fact, the consignor is presumed to have clothed his agent with power to pay such charges upon the goods as are requisite to further the objects of the consignment.

It is customary for the factor to pay inland freight, forwarding charges, and similar expenses incident to the transit of the goods to him; advances are often made by the consignee to the producer, and it is understood by the parties that out of the money realized from sales, these disbursements, and the factor's commissions, are to be paid.

The relation of the factor to his principal is such that, as a

¹ Story on Agency, Sec. 60; Dunlap's Paley on Agency, Sec. 201; Ibid, 207; Houghton v. Mathews, 3 Bos. & Pul. 489. "The credit given by the factor must, however, be reasonable and customary; and the security which he takes from a purchaser must be of such a nature as that the principal may avail himself by the exercise of reasonable diligence, and without being exposed to extraordinary risk or trouble." (Dunlap's Paley on Agency, 207, Note 1; Barton v. Ladok, Bulstr. 103.)

"While no statute or principle of public policy intervenes, but a rule of law is a mere privilege which may be waived, such waiver may as well be by a custom known to, and acquiesced in, by the parties, as by an express contract." (Colket v. Ellis, Court of Com. Pleas of Phil. March, 1875.) A custom or usage, which is relied upon as explanatory of the understanding of parties to a contract, must not be repugnant to the terms of the contract, nor to the law. (Randall v. Smith, 63 Me. 105.)

general rule, the service of the former is not rendered upon the credit of the latter, as in an ordinary employment, and it is seldom that the personal responsibility of the consignor is, by the factor, relied upon. The credit extended by the factor is upon the expectation that he shall be paid from the sale of the produce, and that such is the understanding the consignor is aware; hence, by sending the goods to the factor, the consignor is assumed to have acted with reference to this understanding, and to have contracted with the consignee in such manner as to create in him a special property in the articles consigned, sufficient to protect himself in the premises. This special property being created, the factor may pledge goods consigned to him for advances made to his principal, or for the purpose of raising money for him, or in order to raise money to reimburse himself to the amount of his own lien, or for the payment of duties, or other charge or purpose allowed by law or justified by established usages of trade.¹

§ 279. The factor cannot pledge goods for his own debts which have been consigned to him for sale, or in any manner convert the property of the principal to his own use; he holds himself out to the public for employment in a specified capacity, and the acceptance of his services implies a limit to the trust to the extent usual in such employment. The power of sale does not authorize the factor in disposing of the principal's property by way of barter, or in any other way than by usual course of trade, a departure from which will render the factor directly liable for conversion, and he will be liable to the principal for the value of the goods.²

§ 280. Innocent pledgee of consigned goods not protected.—There is nothing in the consignment of goods to a factor for sale which divests the title of the consignor to any

¹ Story on Agency, 113; *Pultney v. Keymer*, 3 Esp. 182; 2 Kent's Com. 625-8.

² 2 Kent's Com. 626. "Though a factor may sell, and bind his principal, he cannot pledge the goods as a security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of a factor, is no excuse." (*Kennedy v. Strong*, 14 Johns. 128; *Rodriguez v. Hoffman*, 5 Johns. Ch. 417; Story on Agency, 113; Dunlap's Paley on Agency, 207, and Note 1.

extent, other or further than by the creation of the factor's lien for advances and commissions. The ownership remains the same, until an actual sale divests the title in the manner contemplated. When the sale is consummated, it is the act of the owner, by his agent, the factor; and all parties are justified in dealing with the agent, as such, to the extent of his authority to sell, which may be implied from his having the goods in his hands, ostensibly for that purpose. But there is nothing to justify the belief that he is clothed with power to act, with reference to the goods, in any manner other than that which is usual in making sales, and he who deals with a factor in any other way does so at his peril. The title to property can be parted with by the owner's consent, and the pledgee not only has no proof of the owner's assent to the pledge, but he ought to regard the attempt, by the factor, to so dispose of goods, as notice of a wrongful conversion by him.¹

§ 281. Consignor may recover of pledgee value of goods.—If consigned goods be pledged by the factor for his own debt, and the pledgee sell them, the owner may recover of the pledgee the value of the property so pledged and sold. The title to consigned goods being in no wise affected by a pledge of them by the factor, the owner has the same rights against the pledgee, so far as following his property is concerned, which he had against the factor. He has a right to take his property, by paying such charges as he has assented to; and if he find his goods in the hands of the pledgee, he may recover them, upon payment of such charges as the factor might justly make. If, however, the pledgee refuses to deliver the goods, or has so disposed of them that they cannot be reached, he is deemed to have converted them to his own use, to have purchased them at market value, and the owner may recover that value from him.²

¹ Story on Agency, 225; Paley on Agency, 340-2; Ibid, 218; Bouchont v. Goldsmid, 5 Ves. 211; Boyson v. Coles, 6 M. & Selw. 14; Warner v. Martin, 11 Howard, (U. S.) 209; Evans v. Porter, 2 Gall. 13.

² Patterson v. Tash, 2 Strange, 1178; Daubigny v. Duval, 5 T. R. 604; McCombe v. Davis, 6 East, 538; Pickering v. Bask, 15 East, 38; Mason v. Amringe, 1 Mass. 442; Rodriguez v. Hefferman, 5 Johns. Ch. 417; Kennedy v. Strong, 14 Johns. 128; Buckley v. Packard, 20 Ibid, 421; Stearns v. Wilson, 3 Denio, 473; Walker v. Wetmore, 1 E. D. Smith, 25; Kinder v. Shaw, 2 Mass. 398; Florence Sewing Machine Co. v. Warford, 1 Sweeney, (N. Y.) 433.

§ 282. Ignorance that the goods were consigned no defense.—It makes no difference whether or not the pledgee knew that the factor had the goods on consignment.

Commercial usage has created the business of factors. They are a business class as distinct as any other, and, as a general rule, openly act as commission merchants in the sale of goods which belong to other persons. The consignor cannot know what is being done with his property, and he has a perfect right to leave it in a factor's hands for sale without such constant supervision as would obviate the necessity of the employment of such an agency.

The person who deals with a factor, presumed as he is to know the law, is aware that he may have been intrusted with the property for sale without being clothed with any other power of disposal of it.

If he knows that the factor is pledging goods which do not belong to him, he aids him in wrong-doing by receiving the pledge, and therefore merits no protection. If he did not know it, he is deemed to have been put upon inquiry by the factor's occupation, and might have informed himself, and in either event the rule remains the same. The owner may follow his property or recover its value.¹

§ 283. Consigned goods not liable for factor's debts.—An attachment or other legal process against the property of the factor is powerless as against the property which he holds on consignment or for sale on account of another person. The absence of power, on his part, to avail himself of the goods to increase his credit by pledging them for his own debt, limits

¹ Story on Agency, 225. "That a person dealing with a factor or broker is bound to know that, by law, a factor or broker, although a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debts, and, if he receives such a deposit or pledge, the title is invalid, and the property may be reclaimed by the principal; and, in such case, it is wholly immaterial whether the pledgee knew that the party with whom he was dealing was a factor or broker or not. If he knew the fact, he was also bound to know the law applicable to it. If he did not know the fact, his own ignorance would not, ordinarily, enlarge his rights against the principal, since the latter has not held him out to the public as having such an authority." (Wright v. Solomon, 19 Cal. 64; Bonito v. Mosquera, 2 Bosw. 427; Paley on Agency, 213, 216, 218; Newson v. Thornton, 6 East, 17; Benny v. Rhodes, 18 Mo. 147; Hoffman v. Noble, 6 Metc. 68; Holton v. Smith, 6 N. H. 446.)

the rights of his creditors against property ostensibly his own, but which, in truth, he holds as factor for another; and his creditors have no greater power than he possesses. The reason why the factor cannot barter the goods, or pledge them for his debt, is that they are intrusted to him *for sale in the usual mode*, and he cannot pledge or barter them, because it is out of the usual and ordinary course of dealing for him to do so; and the reason of the rule holds good as to all legal processes against the factor personally. In case the factor becomes bankrupt, as to what would be the rights of the assignee to the goods as part of the assets, the rule is the same, and the property is held for the principal. By the Statute of 21 Jac. Chap. 19, Secs. 10, 11, it was declared that if any person shall become bankrupt, and shall, at such time, by the consent and permission of the true owner, have in his possession, order, and disposition, any goods or chattels, whereof he shall be reputed owner, and take upon himself the sale, alteration, or disposition as owner, such goods shall be liable to the bankrupt's debts.

The case, however, of a factor having property of his principal in his possession, though not in the act excepted from its provisions, has always been considered as an exceptional case, and not to be affected by the law, the reason for this being the obvious one, that as factors must, by the course of trade, have the goods of other people in their possession, it does not, therefore, hold out a false credit, nor carry to the understanding of the world the reputed ownership.¹

¹ "It may be laid down, as a general rule, that when the property remitted by the principal, or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property," (1 Bouv. Law Dic. 570) even where it is money in the factor's hands. (Cook's Bank Laws, 400; *L'Apostrophe v. Plaistrier*, 1708; 1 P. Wms. 318; 1 Atk. 175; *Ex parte Dumas*, 1 Atk. 234; *Gardner v. Rowe*, 5 Russ. 262; *Ontario Bank v. Mumford*, 2 Barb. Ch. 598; *Fletcher v. Morey*, 2 Story's Rep. 555, 564.) It may, however, notwithstanding this general principle, be a question of fact whether such a false credit might not, under certain circumstances, be acquired by the factor as would vitiate the rule; as where the goods were permitted to remain in the factor's hands for so great a length of time, or he be allowed to treat them in a manner unusual, or such as would present indicia of ownership so great as to enable him to perpetrate a fraud. It might be said that another rule, viz., that he who culpably or negligently places a person in

§ 284. The factor must obey instructions of his principal. — A factor, who has made no advances and incurred no liability on account of goods consigned to him, is bound to obey the orders of his principal in respect to the time and manner of selling. But if he has made advances, or otherwise incurred a liability upon the credit of the goods, whereby he has acquired a special property therein, he has a right to sell enough to reimburse his advances, or meet his liabilities, unless restrained by some agreement with the consignor. The right, however, is limited to the protection of his own interest in the goods consigned, and is, to that extent, an exception to the general rule that an agent is bound by the instructions of his principal, and disobeys them at his peril.¹

The same general principle extends to the matter of price at which the goods may be sold. The general practice is, however, to rely upon the factor's judgment and experience, and hence has resulted a usage so well established that nothing short of positive, distinct instructions will be construed as limiting the consignee to sales made at specified rates.²

In the matter of remittances, the law holds the consignor to strict accountability. If he accept drafts as money, in the usual course of trade, he must forward them with reasonable diligence, and any loss resulting from his neglect to do so he must answer for. And it is the general duty of the factor to see that sales made by him be wholly in the interest of his employer.³

such position that he may impose upon a third party must abide the consequences. (*Dunlap's Paley on Agency*, 83; 7 Vin. Ab. 89; *Copemann v. Gallant*, MS. Rep. Trin. 1716.)

¹ *Field v. Farrington*, 10 Wall. 141; *Ward v. Bledsoe*, 32 Tex. 251. "Although, as a general rule, factors are bound to obey all orders of their principals respecting the time and mode of sale, yet, when they have made large advances or incurred expense on account of the consignment, the principal cannot, by any subsequent orders, control their right to sell at such time as, in the exercise of a sound discretion, and, in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interest of the consignor." (*Weed v. Adams*, 57 Conn. 378; *Heinkin v. Barbrey*, 40 Ga. 249.)

² *Dunlap's Paley on Agency*, 13-20; *Hinde v. Smith*, 6 Lans. N. Y. 464; *Wheelan v. Lynch*, 65 Barb. 327.

³ *Farmers' Bank v. Sprague*, 52 N. Y. 605; *Chandler v. Hoyle*, 58 Ill. 46; *Winter v. Coit*, 7 N. Y. 288.

§ 285. The purchase by a factor of goods consigned to him is not favored by law. The general rule of agency applies, that an agent can only deal with the subject of the trust in the manner indicated by the creation of the trust.

Agents, from the nature of their employment, become aware of the controlling circumstances of the business of their principals; and, in the case of a factor, he may well be informed of circumstances, affecting the value of the property consigned to him, of which the consignor is not aware.

Moreover, the law presumes superiority and influence on the part of the agent, and there must not only be the most absolute good faith on the part of the factor who himself buys his consignor's goods, but the burden of proof is upon him to show such good faith. The purchase is presumed to be injurious to the person who has created, as against him who has assumed, the trust; and, as against the factor, the consignor may insist upon the sale being set aside, even without showing any actual injury.¹

§ 286. A factor is not an insurer, but must take reasonable care of goods consigned to him, and hence he is not answerable for the safety of goods which he has in his charge. Factors, and other bailiffs to manage for hire, are held liable only to a reasonable exercise of care and diligence in their vocation; hence, they are not liable for any loss by theft, robbery, fire, or other accident, unless it results from their own negligence. If they act with reasonable diligence and care, such as a prudent man would ordinarily exercise in the conduct of his own affairs, and in good faith to their employers, they are protected.

¹ *Rubidoe v. Parks*, 48 Cal. 215. "Agents, from the nature of their employment, are subject to the rule which governs the relation of trustee and *cetui que trust*; and an act of the agent, with respect to the subject-matter of the agency, injurious to the principal, may be avoided by the principal, as between themselves.

"The agent and principal are not absolutely prohibited from dealing with each other, in respect to the subject-matter of the agency or trust; but in all their dealings with each other the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly, and honestly." (*Hilliard on Vendors*, 384; 4 *Kent's Com.* 438; *Terry v. Bank of Orleans*, 9 *Paige*, 648, 662; *Copeland v. Insurance Co.* 6 *Pick.* 203; 1 *Story's Eq.*

If, however, any loss occurs by reason of their negligence, which might have been prevented by the exercise of ordinary care or diligence on their part, and more especially if loss result to the principal by wrong-doing or lack of good faith toward him by the agent, the factor is responsible.¹

§ 287. The objection to the employment of middle-men is not a novel one, which remained to be discovered in modern times; it was more distinctly recognized under common law than it is at present by the statutes. At common law, the buying or engaging of any merchandise or victual, which was intended for sale in open market, and so preventing the king's subject from obtaining the necessaries of life at fair prices, or

Jur. 332; *Campbell v. Walker*, 5 Vesey, 680; *Hardenburgh v. Bacon*, 33 Cal. 377; *Story on Agency*, 308, 328; *Pryn v. Saltus*, 18 How. Pr. Rep. 518.)

¹ *Dunlap's Paley on Agency*, Sec. 16 et seq.; *Story on Bailments*, 455. An agent, by improperly retaining the funds of his principal, or other unfaithfulness to his trust, may forfeit his right to his commissions. (*Sumner v. Reich-eniker*, 9 Kan. 320; *Porter v. Silvers*, 35 Ind. 295.)

An agent, undertaking any business for another, is disabled, in equity, from dealing in the matter of the agency upon his own account, or for his own benefit; and if he do so in his own name, he will be considered as holding in trust for his principal. (*Krutz v. Fisher*, 8 Kan. 90; *Fisher v. Krutz*, 9 Ibid. 501.)

Story on Agency, Sec. 186. "A factor is bound, not only to good faith, but to reasonable diligence. It is not sufficient that he has been guilty of no fraud, or of such gross negligence as would carry with it the insignia of fraud. He is required to act with reasonable care and prudence in his employment, and to exercise his judgment, after proper inquiries and precautions. If he shut his eyes against the light, or sell to a person without inquiry, when ordinary diligence would have enabled him to learn the discredit or insolvency of the party, he will not be discharged from responsibility to his principal."

In the absence of special directions, the factor is supposed to be under instructions to sell for a fair market price, to ascertain which he has contracted; so that a sale, by him, at a price materially less than that, is *prima facie* evidence of either negligence or want of good faith, either of which being established, the factor must make good to his principal the loss occasioned thereby. (*Bigelow v. Walker*, 24 Vt. 149; *Deshler v. Beers*, 32 Ill. 368.)

Usage adopted by a certain class of factors, as to the disposition of the funds of their principals, will not relieve such a duty or a liability, which the law would otherwise impose on him, unless he shows his principal had knowledge of such usage, or that he assented to that mode of doing his business. (*Farmers' Bank v. Sprague*, 52 N. Y. 605.)

But it was lately held that a remittance, by a factor in Buffalo to his principal in Illinois, of a draft from a banker in Buffalo on a house in New York City, on the day of the sale of consigned goods, in compliance with the custom of commission merchants in Buffalo, was an exercise of due diligence, and, upon protest, to exempt the factor from liability for the loss. (*Chandler v. Hoyle*, 58 Ill. 46.)

doing anything to dissuade persons from bringing their goods to market, was made a felony, under the name of "forestalling," and rendered the perpetrators liable to fine and imprisonment, because they made the market dearer to fair traders.¹

In the Roman law, persons who monopolized grain, and other produce of the earth, were called *dardanarii*, and were variously punished.²

The modern objection is differently stated to be, that the necessity of the factor's support depreciates the farmer's gains, but it substantially amounts to the same as that recognized under the common and civil law; and although such interference by middle-men is no longer punished as crime, the law still recognizes the evil and fixes the tax upon the dealer, and not upon the farmer, to accomplish the same result which our ancestors and the framers of the Roman law aimed to regulate by fine and imprisonment; and a condition of things is manifest, not wholly dissimilar to that where licenses are granted to sell liquor, and pursue similar vocations recognized as being injurious to the community, when prohibitory statutes have been found inadequate or inexpedient.

§ 288. A farmer may sell, without license, the produce of his farm, and dispose of that of his neighbors, so long as he does not devote himself principally to trade. The tendency of civilization is to subdivide labor into distinct employments, and so long as the minuteness of the subdivisions does not over-burden the producers by compelling them to support an unfair number of nonproducers, this may be well for the community; but this reasoning only can apply when, by subdivision into special branches of industry, some excellence can be attained in a matter of interest and benefit to the community. Hence, all healthy legislation will encourage the discontinuance of employment of those who, by their labor, add nothing to the

¹ Coke, 3 Inst. 196; Bacon Abr.; 1 Russel, Crimes, 169; 4 Bl. Com. 158. So, also, the offense of "Regrating," defined by Statute of 5 and 6 Edward I, Chap 14: "The buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place." This was punishable, because such practices enhanced the price of provisions, as every successive seller must make a profit, to be paid by the producer.

² Dig. 47, 11, 6.

commonwealth by production at home or importation from abroad, and no more efficient way to accomplish this end has appeared than by removing all barriers between producers and consumers, by encouraging their direct dealing through appropriate legislation, which has generally been construed by the Courts most liberally in favor of farmers.¹

¹ *Barton v. Morris et al.* Supreme Court of Penn. July 3d, 1875. "A farmer who sells the products of his own farm, and occasionally that of his neighbor, cannot be rated as a dealer in goods, commodities, within the meaning of the Mercantile Tax Law."

"Most of the occupations of life trench on each other, and almost every one performs some function which belongs to a business other than his own. If, by reference to these occasional and incidental acts, his pursuit is to be determined, he could be rated and taxed under very many heads. The law, however, regards his permanent and regular occupation, and fixes his liability by that, and not by some act which naturally grows out of it. He may, of course, have two distinct callings, and render himself liable to taxation under both."

"A dealer is one whose business it is to buy and sell. It is a term of trade, having as distinct and well known signification as merchant, mariner, or broker. He is the middle-man who stands between the producer and consumer; his profit is not derived from selling the produce of his farm, but from his skill in knowing when to buy and how to sell the products of others." (*Ibid*, *Norris v. Commonwealth*, 27 Penn. St. 494.)

"A dealer in the popular, and, therefore, in the statutory sense, is not one who buys to keep, or makes to sell, but one who buys to sell again." (*Commonwealth v. Campbell*, 33 Penn. St. 380.)

"It is only when he makes selling his regular and constant business that he should be required to pay the tax." (*Int. Rev. Record*, Vol. 11, p. 28.)

"In all enlightened legislation, the effort is made to bring the producer and consumer together, and probably nothing has been done more to give character to our markets, and to promote the health of our people, than the efforts we have always made to that end." (*Barton v. Morris*, Sup. Ct. Penn. July 3d, 1875.)

But in *Welton v. State of Missouri*, Supreme Court of the United States, February, 1876, it was held: "1. A license tax required for the sale of goods is in fact a tax upon the goods themselves. 2. A statute of Missouri, which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise, which are not the growth, produce, or manufacture of the State, by going from place to place, to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States. 3. That power was vested in Congress to insure uniformity of commercial relation against discriminating State legislation. It covers property which is transported as an article of commerce from foreign countries, or among the States, from hostile or interfering legislation, until it has mingled with and become part of the general property of the country, and protects it, even after it has entered a State, from any burdens imposed by the reason of its foreign origin. 4. The action of Congress in prescribing the rules to govern inter-State commerce, is equivalent to its decree that such commerce shall be free from any restrictions."

CHAPTER XXV.

CARRIERS.

- § 289. Common carrier an insurer, to what extent.
- § 290. Common carrier not an insurer, when.
- § 291. Common carriers not insurers of live-stock.
- § 292. Right of carriers to limit responsibility.
- § 293. Limitation of carrier's responsibility by special contract.
- § 294. The carrier has a lien.
- § 295. Common carrier must show no partiality.

§ 289. The common carrier an insurer, to what extent.

—The necessities of commercial intercourse between the various members of the body politic naturally have given rise to the business of transporting merchandise; and the relation of the parties, as shippers of goods and carriers of them, and the peculiar circumstances affecting this business and these relations, has given rise to and characterized the law of common carriers.

The term has become so generally understood to be those who carry passengers and goods for hire as to require no definition, but the principles of law which affect this occupation may merit attention. The public safety, perhaps more especially in the transportation of merchandise, has, through the law, charged upon the carrier responsibility against all losses except such as result from “acts of God” and “of enemies of the king”; these, human wisdom and strength cannot guard against; but, up to the point indicated, the common carrier is an insurer. The rule, and reason for the rule, cannot be given better than in the language of Mr. Chief Justice Best:

“When goods are delivered to a carrier they are usually no longer under the eye of the owner; he seldom follows, or sends any servants with them to their place of destination. If they should be lost or injured, by the grossest negligence of the carrier or his servant, or stolen from them, or by thieves in collusion with them, the owner would be unable to prove either of

these causes of loss. His witnesses must be the carriers' servants; and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier, which arises immediately out of his contract to carry for a reward, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God, and the king's enemies."¹

§ 290. The common carrier not an insurer, when.—Notwithstanding the rule that the carrier is an insurer against losses not occurring from the act of God or the enemy of the king, it must be understood that he cannot be held responsible for ordinary wear and tear, and chafing of goods in transit, or for ordinary loss from deterioration or shrinkage, while in his charge, or from the inherent, natural infirmity, or tendency to decay or damage, of the articles shipped, as, for instance, fruits, and merchandise of a similar character; or from the diminution of liquids by evaporation, which ordinarily cannot be avoided, or is incident to the character of the goods. All of these natural results, from causes which ordinarily affect goods, are deemed to have been considered as inevitable by the parties to the contract of insurance, and, therefore, not included in it. So, also, there is implied, on the part of the shipper, an assurance that his goods are in a fit condition for transportation; that they are properly packed and put up for shipment; and if loss results, from the goods not having been in proper condition

¹ *Riley v. Horne*, 5 Bing. 217; *Coggs v. Bernard*, 2 Ld. Raym. 909-918; *Orange Co. Bank v. Brown*, 9 Wend. 114, 115; *Story on Bailments*, 488-491. By the term "act of God" is meant inevitable accident or casualty; an accident which arises from a cause which operates without interference or aid from man. Such are the definitions by Story, in his work on *Bailments*, Sec. 489, and in *Bouvier's Law Dic.* p. 69, but some writers declare that there is a distinction between "act of God" and "inevitable accident"; that the former means a result from purely natural causes, such as storms, winds, etc. (*Trent & Mersey Nav. Co. v. Wood*, 4 Dougl. 290; *McArthur v. Sears*, 21 Wend. 198.)

By "the king's enemies" is meant public enemies, with whom the nation is at war. (*Story on Bailments*, 489; *Abbott on Shipp.* p. 3, Chap. 4, Sec. 3.)

for the voyage, or from defects in the package of them, the carrier is not held responsible for such loss.¹

§ 291. Common carriers not insurers of live-stock.—

In the transportation of live-stock there appears to have occurred an especial relaxation of the rule that a carrier becomes an insurer, until from the later American decisions it appears that the common-law rule hardly applies in such cases, and it would seem that the liability of a common carrier of animals is essentially different from that of a carrier of merchandise, or other inanimate property. While common carriers are insurers of inanimate property against all loss and damage, except such as is inevitable, or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care. They do not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves, or one another; they may die from fright or starvation; they may refuse to eat or drink, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires.²

¹ Story on Bailments, Sec. 492a; Bouvier's Law Dic. Vol. 1, p. 299. "The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, provided the carrier exercises all reasonable care to have the loss or deterioration as little as possible." (Fuller, Nisi Prius, 69.)

"A consignor cannot recover for loss of perishable goods shipped in bad condition, even though the carrier's negligence contributed to the loss, unless by ordinary care the former could not have avoided the consequences of the latter's negligence." (Reed v. Phil. Etc. R. R. Co. 3 Houst. [Del.] 176.) The consignment was of a lot of peaches.

"A common carrier is not only responsible for negligence, but is an insurer against any loss not occasioned by act of God, the public enemies, or the fault of the party suffering the loss, and the burden of proof is upon the carrier to show that the loss resulted from one of the excepted cases." (Bohamman v. Hammond et al. 42 Cal. 227.)

"A common carrier of chattels does not insure them against their own fault, or against the fault of their owner; nor against damage caused by an inherent defect in the chattels carried, or by a want of care which the owner was bound to exercise." (Rixford v. Smith, 52 N. H. 355.)

² Boyce v. Anderson, 2 Peters, 150, in which it was held that the carrier of slaves was not an insurer of their safety, but was only liable for ordinary neg-

lect; and this ruling was put on the ground that he could not have the same absolute control over them that he has over inanimate matter.

Clark et al. v. R. & S. R. R. Co. 14 N. Y. 570. "The liability of common carriers of animals is not, in all respects, the same as that of a carrier of inanimate property. But the liability of a railroad company, engaged as a common carrier of animals, is not limited to the careful and safe conveyance of the car containing them. In the absence of a special agreement, the company is responsible for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of animals. But the carrier is not an insurer against injuries resulting from the nature and propensities of the animals, and which diligent care cannot prevent. As to damages arising from other causes the liability is the same as that of a carrier of other property."

M. S. & N. I. R. R. Co. v. McDonough, 21 Mich. 165; *Angell on Carriers*, 214a. "If it should be conceded that, in the absence of any contract, receipt, or regulation, the full liabilities of common carriers do not exist with respect to railroads when engaged in the transportation of live-stock, there is, notwithstanding, no principle of law which, in the absence of contract, exonerates them from the exercise of ordinary care."

German v. B. R. Co. 38 Iowa, 131. "In an action against a railroad company to recover for injuries done by one of plaintiff's pair of horses to his mate, while being carried by the defendants, the defendants requested a ruling that if they used due diligence and care, and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the horses, such as fright or bad temper, they were not liable; the judge refused this ruling, but ruled that if the horse was injured by his mate in an outburst of viciousness, quite unusual in horses worked together, the jury might find for the defendants. Held, that the defendants had good ground of exception." (*Evans v. Fitchburg R. R. Co.* 111 Mass. 142; *Louisville R. R. Co. v. Hedger*, 9 Bush, [Ky.] 645; *Cent. L. J.* Jan. 28th, 1876.)

Penn v. B. & E. R. R. Co. 49 N. Y. 207. "The liability of a common carrier of animals is essentially different from that of a carrier of merchandise or other inanimate property. While common carriers are insurers of inanimate property against all loss and damage, except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care."

Bissell v. N. Y. C. R. R. Co. 25 N. Y. 442; *Smith v. N. H. & N. R. R. Co.* 12 Allen, 531; *Cragin et al. v. N. Y. C. R. R. Co.* 51 N. Y. 63. This was an action brought to recover damages for the loss of forty-three hogs out of a lot of hogs transported for plaintiff by defendant from Buffalo to Albany, June, 1858. The hogs died from the effects of heat, the result of the negligence of the defendant's agents in not watering, wetting, and cooling off the hogs on the way to their destination. There was a special agreement as to responsibility, but the general rule, as given, applies to all similar cases, viz.: "Defendant contracted to transport a lot of hogs for plaintiffs from Buffalo to Albany. By the contract, in consideration of a reduced rate of freight, plaintiff assumed the risk of injuries from heat, etc. Forty-three of the hogs died from the effects of heat, the result of the defendant's employees in not watering and cooling the hogs by wetting. In an action to recover damages, held, that as the common-law liability of carriers did not apply to live-stock, but in the transportation thereof they were liable only for negligence, to give effect to the stipulation in the contract it must be construed as exempting defendants from injuries by heat, the result of negligence, and that, therefore, defendants were not liable." (*Carr v. L. & Y. R. R. Co.* 14 Eng. Law & Eq. R. 340; *McManus v. L. & Y. R. R. Co.* 2 Hurl. & Norm. 393.)

§ 292. The right of carriers to limit their responsibility.

—As to the power of the carrier to limit his responsibility by notices to the shipper, or by special agreement, there has been much controversy. In England, the general tenor and effect of the decisions has been that, viewing the hardship to which the carrier is exposed by being forced to take and safely transport all goods intrusted to his care, he ought to be permitted to limit his liability by such notices of the character of his employment as change him from a *common carrier* to a *special carrier*,¹ although, upon the inconveniences arising to the public from such exceptions to the common rule, much opposition has occurred to this innovation.

But, in America, the converse is the present result of the decision, and the weight of authority is against the validity of public notices given by the carrier seeking to restrict his liability, although the knowledge of the existence of such notice has been brought home to the shipper of the goods.² Although it must be considered that many able jurists in the Courts of the

L. S. & M. S. R. R. Co. v. Perkins, 25 Mich. 329. "Railroad companies are not, by the common law, common carriers of live-stock, and can only make themselves common carriers of that species of property by assuming to convey it as common carriers." (*M. S. & N. I. R. R. Co. v. McDonough*, 21 Mich. 165.)

¹ *Riley v. Horne*, 5 Bing. 217; *Southcote's Case*, 4 Co. Rep. 84; *Morse v. Blue*, 1 Vent. 238; *Peck v. N. S. R. R. Co.* 10 H. L. C. 493; *Austin v. Manchester, Etc. R. R. Co.* 11 Eng. Law & Eq. 512; *Harris v. Packwood*, 3 Taunt. 264; *Evans v. Soule*, 2 M. & Selw. 1; *Smith v. Horne*, 8 Taunt. 146; *Batson v. Donovan*, 4 Barn. & Ald. 39; *Riley v. Horne*, 5 Bing. 217; *Chipperdale v. L. & N. R. R. Co.* 7 Eng. Law & Eq. 395; *O. S. N. Co. v. Shand*, 3 Moore P. C. (N. S.) 272.

² Although a common carrier may limit his common-law liability by special contract, assented to by the consignor of the goods, an unsigned general notice, printed on the back of a receipt, does not amount to such a contract, though the receipt, with such notice on it, may have been taken by the consignor without dissent. (*R. R. Co. v. Mfg. Co.* 16 Wall. 319.) The case was an action for damages for injury to a lot of wool, shipped on defendant's train, plaintiff receiving a receipt therefor, in usual form, upon the back of which was printed a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company. The Court, in concluding as above cited, earnestly expresses itself as opposed to relaxation of the common-law rule by a notice of this character, as not only against the policy of the law, but a serious injury to commerce, inasmuch as the carrier, in his public character, is practically able to impose any terms he chooses, by printing notices upon his receipts, and a shipper cannot be deemed to assent thereto, but rather to send his goods by the sole conveyance at his command, and he is not bound to notify the carrier that he relies upon the law and dissents from the stipulation contained in the notice.

United States admit the force of reasoning in the English cases, and insist that common carriers may qualify their common-law responsibility by notice brought home to the knowledge of the owner of the goods, and assented to by him,¹ and more especially in the matter of transportation of passengers, that the company, by a printed notice, require the traveler to disclose the value of the baggage which he carries.

§ 293. Limitation of carrier's liability by special contract.—The law undertakes, in some instances, to make an agreement for individuals by establishing presumptions that negotiations have been entered upon, or employment given, upon an understanding to which the parties have not seen fit to give expression; but, as this is in the nature of a protection, such legal presumption does not prevent the showing of a different state of facts, and it is manifest that the contract which the law imposes may be varied by the parties to it; as in all cases

"If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence; but, in the nature of the case, this equality does not exist, and, therefore, every intention should be made in favor of the shipper.

"It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper is not, as a general thing, in a condition to contend with him as to terms, nor to await the result of an action at law, in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay by sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility, has gone as far in this direction as public policy will allow. The weight of authority is against the validity of the kind of notices we have been considering." (2 Parsons on Cont. 238, Note n, 5th Ed.; Redfield on Railways, p. 369; *McMillan v. M. S. & St. I. R. R. Co.* 16 Mich. 109; *Case of The Pacific, Deady*, 17; *Southern Ex. Co. v. Crook*, 44 Ala. 468; *Blossom v. Dodd*, 43 N. Y. 264; *Baltimore, Etc. R. R. Co. v. Brady*, 32 Md. 333; *Menzell v. R. R. Co.* 1 Dill. 531; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, *Ibid.*, 251; *Camden Co. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, *Ibid.*, 153; *Alexander v. Greene*, 3 Hill, 9; *Powell v. Meyers*, 26 Wend. 594; *C. & A. R. R. Co. v. Burke*, 13 Wend. 611.)

¹ *Atwood v. R. T. Co.* 9 Watts, Penn. 87, in which it was held that a common carrier could qualify his acceptance of goods for transportation in such manner as to diminish his common-law liability as an insurer, and that such a qualification was made by a printed notice on the receipt, the notice having been brought to the notice of the shipper.

Bingham v. Rogers, 6 Watts. & S. 495; *Thomas v. B. & P. R. R. Co.* 10 Metc. 472. And there are several decisions to the effect that common carriers may, by notice brought home to the shipper, or the passenger upon lines of travel, require him to state the nature and value of the property, or may for that purpose make a special acceptance.

where the law presumes a contract, by the assumption of special relations between the parties, it may be shown that another and different contract was, in fact, entered upon, and the legal presumption yields to proof of another agreement entered into by the parties with relation to the subject-matter, and therefore the common carrier may limit his responsibility as an insurer by a special agreement to which the shipper is a party.¹

§ 294. The carrier has a lien upon the goods intrusted to his care for shipment, and also for his advances for freight paid by him to other carriers who have transported the goods part way on their route, and for storage which was necessary for their safety, and he cannot be compelled to deliver them until his reasonable charges and advances have been paid.²

This lien, however, is not for any service other than for transportation of the identical property, and does not extend to any unpaid balance due on former shipments; and his lien depends upon his continued possession of the goods, for if he allow them

¹ *R. R. Co. v. Mfg. Co.* 16 Wall. 319; *Ante*, Note 2; *Knell v. U. S. & B. S. S. Co.* 33 N. Y. 423; *Blossom v. Dodd*, 43 N. Y. 264.

Although the liability of a common carrier may be reasonably limited by special contract, public policy will not permit common carriers, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves or others. *School, Etc. v. Boston, Etc. R. R. Co.* 102 Mass. 552; *Christenson v. A. E. Co.* 15 Minn. 270; *Case of Pacific*, 1 Deady, 17; *Lamb v. C. Etc. R. R. Co.* 46 N. Y. 271; *Caldwell v. N. J. S. S. Co.* 47 N. Y. 282; *Bankard v. B. Etc. R. R. Co.* 34 Md. 197; *Case of the City of Norwich*, 1 Ben. 271, in which a receipt was given by a common carrier for property intrusted to him, stating that no package, if lost, damaged, or stolen, should be deemed of greater value than one hundred dollars, unless specifically receipted for. Held, that the limitation was ineffective against a loss arising from negligence, as being against public policy. To same effect, see *Southern Ex. Co. v. Crook*, 44 Ala. 468, and *R. R. Co. v. Lockwood*, 17 Wall. 357, in which, before being permitted to ship his cattle in a railroad train, a drover was required to sign an agreement exempting the railroad company from all liability by loss of or damage to the animals, even when caused by the negligence of the company's employees. Held, that such an exemption is not just or reasonable in the eye of the law, and should not be upheld.

² *White v. Vann*, 6 Humph. 70; *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Sodergren v. Flight*, 6 East, 622; *Abb. Shipp.* 268; *Hutton v. Bragg*, 2 Marsh. 345; *Stevenson v. Blakelock*, 1 Maule & Selw. 543; *Chase v. Westmore*, 5 Maule & Selw. 186; *Hunt v. Haskell*, 24 Me. 329; *Wilson v. Grand Trunk R. R. Co.* 56 Me. 60.

to go from his possession, the lien is lost and cannot be revived, even by his recovering possession of the property.¹

He cannot, however, sell the goods without legal proceedings to establish the validity of his claim against the shipper, and such proceedings must be for the express purpose of enforcing the lien in a Court of competent jurisdiction. An action at law upon the contract is not alone insufficient for that purpose, but is liable to cause the lien to be lost.²

The carrier's lien does not extend to goods wrongfully delivered to him by a person not the owner, although the carrier receive and transport them innocently.³

§ 295. A common carrier is bound to treat all alike who employ his services. His duty to the public is such that he cannot lawfully make or give any undue preference or advantage to, or in favor of, any person, or subject any person to prejudice or disadvantage in respect to terms, facilities, or accommodations; and the carrier will be liable for any damage arising from a violation of this duty. The only excuse which he can make for not receiving and forwarding freight or passengers is that his means of conveyance is exhausted by freight or passengers already received, provided it appears that the property offered to him for carriage is brought to him at the proper place, and in due time to conform to his established rules, or the proposed passenger is at the appointed place at the time fixed for departure. And this duty he owes to the public at large, without distinction of persons, so that he cannot

¹ Story on Bailments, Sec. 588; *Sullivan v. Park*, 33 Maine, 438; *Adams v. Clark*, 9 Cush. 215; *Kinlock v. Craig*, 3 Term R. 119; *Sweet v. Pyne*, 1 East, 4; *Yates v. Ralston*, 8 Taunt. 293; *Bowman v. Hilton*, 11 Ohio, 303; *Wingard v. Banning*, 39 Cal. 453; Story on Agency, Sec. 367.

² *Jones v. Latrobe*, 5 Bing. 130; Story on Agency, Sec. 367. "If a person having a lien on goods should cause them to be taken in execution at his own suit, he would lose his lien thereby, although he should become the purchaser of them at the execution sale, and they were never removed from his premises." So, in *Wingard v. Banning*, 39 Cal. 453, it was held that where one sued out a writ of attachment, and procured it to be levied on property on which he had a carrier's lien, he lost his lien.

³ Story on Agency, Sec. 588. A carrier of goods, at the request and for the convenience of his bailee merely, has no lien upon the chattel for his services as against the owner. (*Gibson v. Gwinn*, 107 Mass. 126; *Van Buskirk v. Purinton*, 2 Hall, 561; *Richards v. King*, 6 Whart. 418; *Fitch v. Newberry*, 1 Doug. 1.)

charge one more than another, or any one more than his established rates.¹

¹ A common carrier has no right to discriminate, in forwarding freight, between two classes of shippers, by deliberately delaying or stopping the property of one class in order to give preference to that of another, contrary to the usual course of business. (*Keeny v. G. T. R. R. Co.* 59 Barb. 104; *McDuffy v. R. R. Co.* 52 N. H. 730.)

Story on Bailments, Sec. 508. "One of the duties of a common carrier is to receive and carry all goods offered for transportation, by any person whatsoever, upon receiving a suitable hire. This is the result of his public employment as a carrier; and, according to the custom of the realm, if he will not carry goods for a reasonable compensation, upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is reasonable ground for the refusal; and he has no right to charge one higher rates than he serves others for."

Bac. Abridg. Carriers, B; *Boulston v. Sandford*, Skin. R. 279; *Jackson v. Rogers*, 2 Shower, 327; *Rex v. Kilderby*, 1 Saund. 312; *Riley v. Horne*, 5 Bing. 217; *Crouch v. London & North Western R. R. Co.* 25 Eng. Law & Eq. 287. But carriers may discriminate, in some instances, between different classes of freight, as where, from special causes, they are put to greater risk or expense in handling the goods, as in goods which are in small parcels, by different shippers, necessitating more clerical labor and additional trouble." (*Parker v. G. W. R. R. Co.* 6 Ellis & Blackburn, 77; Story on Bailments, 508 note 1.)

CHAPTER XXVI.

LANDLORD AND TENANT.

- § 296. Covenant for quiet enjoyment.
- § 297. Covenant against incumbrances.
- § 298. Obligation to pay taxes.
- § 299. Common-law rule as to repairs.
- § 300. Distinction in farming leases as to repairs.
- § 301. Tenant's right to make alterations.
- § 302. Distress for rent.
- § 303. Landlord's title may not be disputed by tenant.
- § 304. Lease may be attacked by tenant for fraud.
- § 305. As to waste, in farming leases.
- § 306. Right of tenant to cut trees for fuel.
- § 307. Tenant's duty to preserve property.
- § 308. Tenant's right to remove fixtures.
- § 309. Distinction, as to removal of fixtures, against agricultural tenants.

§ 296. Covenant for quiet enjoyment.—The principal covenant on the part of the landlord is that, for the time included within the term for which the premises are leased, the tenant shall have the quiet enjoyment and possession of the premises. The law imposes this covenant from the nature of the relation of the parties to each other, and the subject-matter of the transaction; it is to be assumed, against a lessor, that he owns the land leased; that, therefore, he has the right and power, by lease, to assign the possession for the term, and an engagement to this effect on his part is always implied.

Resulting from this covenant, the right to demand rent depends on the undisturbed possession of the tenant, the engagement on his part to pay it being in consideration of his having the use of the premises: if that fails, the consideration for the contract is gone, and it cannot be enforced.¹

¹ *Wilson v. Raybould*, 56 Ill. 417; *Mack v. Patchin*, 42 N. Y. 167; *Home Etc. Ins. Co. v. Sherman*, 46 N. Y. 370; *Taylor's Landlord and Tenant*, Sec. 304. A mere disturbance of the tenant's possession by a trespasser does not, however, discharge him from payment of rent; that is not breaking the covenant by the landlord, because the injury is one which he is not responsible for. He simply

§ 297. Covenant that the land is free from incumbrances.—Another covenant on the part of the landlord, which the law implies, is that the demised premises are free from incumbrances; otherwise the tenant might, notwithstanding the lessor owns the land and has a technical right to lease, be deprived of his term by the act of the lessor. It appears that, even without being actually ousted by the holder of the incumbrance, the tenant may maintain an action for breach of this covenant, the mere liability or chance that he may be disturbed being a technical breach of the covenant; but no more than nominal damages could be recovered.¹

§ 298. Obligation to pay taxes.—Another agreement incidental to the reasoning which imposes upon the landlord a covenant that the premises are unincumbered, is the obligation to pay the taxes and lawful assessments upon the premises during

covenants that the land is his and that he has a right to lease it. Hence, an eviction by a superior title is a breach of the covenant that he is the owner, but the act of a stranger to the title is not sufficient to discharge the tenant, even if his possession is disturbed. (Taylor's *Ld. and Ten. Secs. 305, 306*; *Gartside v. Oakley*, 58 Ill. 210; *Gardner v. Keteltas*, 3 Hill, 330.)

From the covenant for quiet enjoyment has resulted a strict rule against the landlord. A stranger, who is a trespasser, may oust the tenant, and he still be held to pay the rent, but if the landlord disturb the possession in the least he does so at his peril, and if he willfully enter upon, and expel the tenant, actually or constructively, from a part of the demised premises, the rule has been held to be that the whole rent is suspended during the term, though the tenant continue in possession of the residue. (*Johnson v. Oppenheimer*, 12 Abb. [N. Y.] Pr. N. S. 454; 43 How. Pr. 433.)

Taylor's *Ld. and Ten. Sec. 378*; *Tunis v. Grandy*, 22 Gratt. (Va.) 109. "When a lessee is evicted of a part of the demised premises, by one claiming under a title superior to that of the lessor, he is discharged from the payment of so much of the rent only as is properly chargeable to the part of the premises from which he was evicted. But when a tenant is evicted, though from a part of the demised premises only, by the wrongful act of the landlord, he is discharged from the payment of the whole rent."

"Where a tenant is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from payment of any of the rent, although he remains in possession of the remaining portion of the premises to the end of the term." (*Hagner v. Smith*, 63 Ill. 432.)

But to constitute an eviction, there must be more than a mere trespass by the landlord. There must be something of a grave and permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the premises; the question of eviction or no eviction depending upon the circumstances, and being a matter for the jury to decide. (*Ibid.*)

¹ Taylor's *Landlord and Tenant*, Secs. 318-22; *Jenkins v. Hopkins*, 8 Pick. 346; *Chapel v. Bull*, 17 Mass. 220; *People v. Nelson*, 13 Johns. 340; *Jackson v. Sternberg*, 20 Johns. 49; *Barrett v. Porter*, 14 Mass. 143.

the term; these the landlord must keep paid, in order that, the claim of the law being paramount, the tenant cannot be otherwise protected in his possession; and if the tenant pay the taxes, he may deduct the amount paid from rent due, the rule in such matters being that when a tenant has been compelled to pay out money to protect his possession, he is considered as having been authorized by the landlord so to apply his rent, whether it was due or to become due.¹

§ 299. Common-law rule as to repairs.—As to repairs, the common-law rule is that the expenses of them must be borne by the tenant, and no covenant is implied which will compel the landlord to become liable for them; even if the buildings burn down, the rent for them may be collected by the landlord, from the tenant, and if they were insured in favor of the landlord, the tenant cannot compel him to appropriate the insurance money to rebuilding.²

In New York, the statute has changed the common law, and made the rule that the landlord must keep the premises in repair.³ And in Louisiana, the converse of the common-law rule is held to be the law.⁴

¹ It is not unusual to insert in the lease a covenant on the part of the tenant to pay the taxes. Of course, it will be understood that the covenants mentioned as implied by law may be waived or changed by the parties; the law only makes for the parties the contract, where they have not done it for themselves.

"The obligation of the landlord to pay all public charges against the property, except such as the tenant has undertaken to pay, renders him liable also to reimburse the tenant for all such payments as he has been obliged to make, in order to protect his goods, or the property leased, from other demands of the public collector." (Taylor's *Ld. and Ten. Sec.* 342; *Ibid.*, *Sec.* 341; Taylor v. Zamira, 6 Taunt. 524; Roe v. Hayley, 12 East, 469; Carter v. Carter, 5 Bing. 409.)

But a tenant for life is bound for taxes. (Prettyman v. Walston, 34 Ill. 191; Taylor's *Land. and Ten. Sec.* 318.)

² *Mumford v. Brown*, 6 Cow. 478. "The tenant takes the premises for better and for worse; he cannot involve his landlord in the expense of repairs without his consent—*Brewster v. De Fremery*, 33 Cal. 345, in which the Court held "that a landlord is in no case bound to repair, unless by force of an express covenant or contract." (*Casad v. Hughes*, 27 Ind. 141; *Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw. 127; *Kellenberger v. Foresman*, 13 Ind. 475; *Doupe v. Genin*, 45 N. Y. 119; Taylor's *Land and Ten. Sec.* 327-8; *Wiltz v. Mathews*, 52 N. Y. 312; *Kline v. Jacobs*, 68 Penn. St. 57.)

³ Laws of 1860, N. Y. 592, under which a tenant may surrender when the premises become untenable, and free himself from payment of rent thereafter, so that in effect, if the landlord desires to keep his tenant, he must repair.

⁴ *Perrett v. Dupré*, 3 Rob. La. 52; *Coleman v. Haight*, 14 La. An. 564. But it is apparent that Louisiana is the exception, and such from the fact that the civil

But, as in other cases, the parties may make such contracts as they please, and change the rule as to themselves; where the landlord assumes the cost of keeping the buildings in repair the tenant is justified in deducting from the rent due so much as he has been compelled to pay out for repairs such as the landlord has agreed to make; this he may do, however, only upon due notice to the landlord of the necessity, accompanied with a demand that he comply with his engagement, for the covenant is not that he will permit the tenant to make the repairs and reserve the cost from the rent, but that he, the landlord, will do, or cause to be done, the work; hence, default must be shown before the tenant can be sustained in making and charging to his landlord the requisite disbursement.¹

§ 300. Distinction in farming leases as to repairs.—Farming leases differ from others in the matter of repairs. Generally, under the common-law rule, and where local statutes have not otherwise provided, the tenant must keep in repair the demised premises, but an exception to this rule is made in favor of the tenant of farming lands. Like tenants of other premises, he is bound to keep in repair the dwelling-house, but there his obligation ceases; he is not bound to repair the barns, stables, or other buildings, nor the fences, further than in so far as the law imposes that duty upon him under the implied covenant on his part to treat the farm in a husbandlike manner; as to what that is to be deemed, depends upon the usages of the vicinity, and the implied covenant to repair by the tenant is generally considered to extend no further than those which may be required upon the dwelling-house.²

law appears always to have recognized the proposition that he who leases property guarantees its present and continued fitness for the purposes to which by the lease it is devoted. (Code Nap. 1722; Code of Louisiana, Art. 2667; *Scudder v. Paulding*, 4 Rob. La. 428.)

¹ *Kip v. Merwin*, 52 N. Y. 542; *Farrot v. Mettler*, 21 La. An. 220; *Gerzebeck v. Lord*, 33 N. J. L. 240; *Norfleet v. Cromwell*, 64 N. C. 1.

² *Taylor's Landlord and Tenant*, Sec. 344.

“As to farming leases, a tenant is also under a similar obligation to repair, but it differs from his liability to repair houses in this respect, that it extends only to the dwelling-house occupied by the tenant; the burden of repairing the out-buildings and other erections on the farm being sustained either by the landlord or the tenant, (in the absence of any express provision in the lease) according to the particular custom of the country in which the farm is situated.”

§ 301. The tenant's right to make alterations.—The right which the tenant has is to make use of the property. The power of making alterations does not arise out of a mere right of user. It is, therefore, incompatible with his interest for a tenant to make any alteration, unless he is justified by the express permission of his landlord.¹

By a lease, the use—not the dominion—of the property demised, is conferred. If a tenant exercises an act of ownership he is no longer protected by his tenancy.

It is, in general, not necessary for the landlord to wait until the end of the term before proceeding against the tenant for making unwarranted alterations; and there appears to have been no case in which the landlord was required to wait until the end of the lease to see whether the tenant has gone beyond the powers conceded by the lease, or whether the premises might be restored by the tenant to their original condition. If the waste committed went beyond the license, an immediate wrong was done, which was at once the subject of redress in a Court, either of law or of equity.

The Courts have exercised the power over tenants in a manner quite watchful of the interests of the landlord, and have never left the matter for adjustment when, as at the end of the term, the landlord could have no redress except a personal judgment against the out-going tenant; and whenever the tenant has gone beyond the powers conceded by the lease, he has been restrained by injunction, or compelled at once to make satisfaction, or to restore the premises to the condition in which he found them.²

But it is not such an alteration as would warrant an action at law, or in equity, for a tenant to put new structures or other improvements on the property, as the requirements of his business demand, so long as, in so doing, he does nothing to injure

¹ Taylor's L. and T. 348; *Farrant v. Thompson*, 5 B. & Ald. 826; *Doe v. Jones*, 4 B. & Ald. 126; *Jackson v. Tibbetts*, 3 Wend. 341; *Baxter v. Taylor*, 1 Nev. & Man. 11. "A lessee, in the absence of an agreement to that effect, or of an express permission from his lessor, is not justified in making alterations in the demised premises." (*Agate v. Lowenbein*, 57 N. Y. 604.)

² *Packington v. Packington*, 3 Atkyns, 215; *Rolt v. Lord Somerville*, 2 Ab. Eq. 759; *Astor v. Astor*, 1 Vesey, Sr. 264; *Strathmore v. Bowes*, 2 Bro. Chap. 88; *Marker v. Marker*, 4 Eng. Law and Eq. 36; 1 Washburn, R. P. 120; *Agate v. Lowenbein*, 57 N. Y. 612-4.

or impair the value of the freehold. An agricultural tenant might, therefore, make such alterations as consisted in fencing, erecting new buildings, and similar improvements; but he would have no right, in so doing, to pull down valuable buildings, permanent fences, or other improvements already existing on the demised premises. He has no right to so meddle with existing condition of things, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to make it impossible for him to restore the premises, at the expiration of the term, substantially as he received them.¹

§ 302. Distress for rent has been so far superseded by statutory regulations as to have lost many of its distinguishing features as a common-law remedy in favor of the landlord to obtain his rent; but the chief characteristics of the proceeding still affect many of the States.

By this procedure, the landlord seized the tenant's goods and chattels, held them in pledge for a specified time, and then, the rent remaining unpaid, sold them, and applied the proceeds to the payment of the debt.

The proceeding is not governed by the practice affecting ordinary trials at law; it originates from the action of the landlord. The levy is made under his authority, and not under a process of the Court. After the seizure is made, however, the matter is transferred to the appropriate Court, for the purpose only of ascertaining whether the relation of landlord and tenant exists, and what sum was due for rent when the goods were seized.²

¹ Taylor's Landlord and Ten. 348; *Sheffelin v. Carpenter*, 15 Wend. 400; *Winship v. Pitts*, 3 Paige, 259. See *Pennybacker v. McDougall*, 48 Cal. 160-4; *Jesser v. Gifford*, 4 Burrow, 2141. Good faith, on the part of the tenant, is no defense where the act, on general principles of law, amounts to waste. (*Clarke v. Holden*, 7 Gray, 8.)

² *Allwood v. Mansfield*, 33 Ill. 452; 3 Kent's Com. 476; Taylor's Land. and Ten. 556. This remedy appears to be in full force in the New England States through the law of attachment on meane process. In South Carolina, double rent may be collected; and Chancellor Kent declares that the English common and statutory law, in relation to distress for rent and the relief of landlords, has been generally adopted by the United States. (3 Kent's Com. 472.) But careful examination of the laws discloses that the adoption of the common law has been followed by statutory enactment, in the several States, so far modifying the same

§ 303. The landlord's title cannot be disputed by the tenant.—The relation of the parties, one to the other, and each to the property leased, is such that public policy demands the rigid enforcement of this rule; so that, in whatever form of action, the matter of title is of importance. He who occupies the relation of tenant, having once recognized another person as his landlord by accepting a lease from him, or the like, is precluded from showing that he from whom he has leased had no title at the time the lease was granted. And this rule extends to a tenant holding over, as well as to an under tenant, assignee, or other person claiming under the lessee, and is applicable to every species of tenancy, whether for years, at will, or by sufferance.¹

§ 304. A fraudulent lease may be assailed by the tenant.—The tenant may, by direct attack, assail a lease obtained from him through fraud, or by unfair practices, to induce him to take a lease of premises which were in his possession.²

that in New York, North Carolina, California, Tennessee, Ohio, and Alabama the remedy has ceased to exist; and the general tendency of rulings by the Courts is to deem the remedy objectionable, and fit to be abolished, as being an unreasonable and oppressive relic of the feudal system, repugnant to the policy of our institutions.

Youngblood v. Lowry, 2 McCord, 39; *Dalgleish v. Grandy*, Cam. & Nor. 22; *Deanes v. Rice*, 3 Batt. 431; *Bohm v. Dunphy*, 1 Mon. T. by which it appears that, in Montana Territory, the common-law remedy by distress has been superseded by the statutory remedies given by statute. So, in Mississippi, it is held that the statutory remedies have superseded the common-law right of distress. (*Marge v. Dyche*, 42 Miss. 347.)

¹ *Bremer v. Bigelow*, 8 Kan. 497. "A tenant cannot, as a rule, dispute the title or right of possession of his landlord, nor of any other person who has succeeded to the rights of his landlord, as long as such tenant holds possession derived originally from his landlord."

Taylor's Landlord and Ten. Sec. 705; *Townsend v. Davis*, Forrest, 120; *Simmons v. Robertson*, 27 Ark. 50; *Prevot v. Lawrence*, 51 N. Y. 219. "The tenant cannot, during the term of a lease, hold out adverse possession against the landlord by the mere intention so to hold, and without doing some act which would amount to adverse possession by a tenant who enters under a lease." (*Abbey Homestead Association v. Willard*, 48 Cal. 614; *St. John v. Quitzen*, Sup. Ct. Ill. June, 1874.)

"Whilst it is true, as a general proposition, that a tenant cannot dispute his landlord's title, yet he may show that it has terminated by its own limitation." (*Tilghman v. Little*, 13 Ill. 239; *Franklin v. Palmer*, 50 Ill. 202.)

² *Jenckes v. Cook*, 9 R. I. 520. "One whose signature to a lease has been obtained through fraud or misrepresentations, is not precluded from denying the lessor's title." (*Taylor's Land. and Ten. Sec. 705*.)

He may also set up against his landlord the title under which he leased from him; may buy in the same at sheriff's sale in an action against his lessor, or at a tax sale, unless he was bound to pay the taxes, and the title thus acquired he may oppose to his landlord's claim for the premises; and¹ unless he received the possession from the landlord, the tenant may assail the lease by showing that he paid rent under a mistake of facts, there being a recognized distinction between a deliberate entry into possession under a lease, and an acknowledgment of title by paying rent for premises which are in the possession of the tenant.²

§ 305. As to waste in farming leases.—The general definition of the word, "a spoil or destruction, either voluntary or permissive, of the houses, lands, or tenements, to the damage of him who is in reversion or remainder," does not go enough into details to be of value.

Waste may be incurred in respect to the soil, as well as to buildings, trees, fences, or even live-stock, and the law regards as waste every act or omission which does a permanent injury to the inheritance; and even in the matter of repairs, if the tenant thereby has added to the permanent value of the premises, to remove them is waste.³

Destruction of farm buildings, fences, and other structures, by the elements, becomes waste when it might have been avoided by the exercise of an ordinary, reasonable exercise of care and

¹ *Miller v. McBrier*, 14 S. & R. 382; *Newman v. Rutter*, 8 Watts, 51; *Taylor's Land. and Ten.* 705; *Miller v. Bonsaden*, 9 Ala. 317. "So if he buy in the whole or part of the lessor's title at a tax or execution sale, or by private purchase, it is a proportionate defense to suit for rent or ejectment." (*Nellis v. Lathrop*, 22 Wend. 121; *Evertson v. Sawyer*, 2 Wend. 507.)

² "There is a difference, also, whether the party has received possession from the lessor of the plaintiff, or has merely admitted his title by paying rent. In the former case, he is estopped from denying it without any title at all; but in the latter, the defendant may rebut the presumption arising from such payment, by showing that he paid the rent under a mistake or through misrepresentations." (*Taylor's Land. and Ten. Sec.* 707; *Remil v. Robinson*, 1 Bing. 147; *Fleming v. Gooding*, 10 *Ibid.*, 549; *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202.)

³ *Co. Lit.* 53b; 2 *Roll. Abr.* 816, 1, 15. "Voluntary waste consists in doing something which the tenant is prohibited by law from doing; while permissive waste allows something to happen which he is by law bound to prevent. The one is an offense of commission, the other of omission." (*McGregor v. Brown*, 10 N. Y. 114; *Livingston v. Reynolds*, 2 Hill, 157.)

precaution; and so of loss by fire—it is waste when occurring through the tenant's carelessness.¹

§ 306. Right of tenant to cut fire-wood.—In the matter of cutting wood, it is not necessarily waste for the tenant so to do; manifestly, to cut fire-wood from the trees of an orchard, or from timber-trees, which, from their position, have an especial value to the premises, is waste; while to cut trees which are not timber, or growing in defense of or to ornament the house, or fruit-trees, growing in an orchard or garden, will amount to waste, and local custom and particular circumstances must be taken into account in determining whether the cutting of any given wood is waste or not.²

§ 307. Tenant's duty to guard property against injury.—The tenant, under farming lease, is bound to protect the property from injury to the extent of his ability; he is not an insurer against casualties, but the law implies a covenant on his part to exercise over the property leased the same care which a prudent person would ordinarily manifest in that of his own property.

The landlord may look to his tenant to make good all injuries to the premises while in possession of the tenant, regardless of whether caused by the act or negligence of the lessee or by a stranger. While the possession and control of the property rests with the tenant, the landlord, being deprived of the power to protect it, may rely upon the covenant against waste.³

§ 308. The right to remove fixtures which the tenant has placed upon the leased premises appears generally to have been conceded. The rules concerning fixtures are to be construed with the greatest liberality in favor of tenants, while between

¹ "If a house be destroyed by a tempest, fire from lightning, or the like, which is an act of Providence, it is not waste, for *actus Dei nemini facit injuriam*; yet it becomes so if the damage done by the tempest was occasioned by the tenant's previous neglect to repair, or if he does not forthwith proceed to repair." (Taylor's L. and T. Sec. 347; Moore, 62; Viner's Abr. Waste, 1.)

² Taylor's L. and T. Sec. 305.

³ "In the absence of a special agreement to the contrary, the tenant is liable to the landlord for all waste, by whomsoever committed; having his right of action over against the actual wrong-doer." (Parrott v. Barney, 2 Abb. U. S. 197.)

vendor and vendee, heir and executor, mortgagor and mortgagee, the strictest construction obtains.¹

It is, however, essential that the tenant remove his fixtures without permanent injury to the freehold, and, unless he can do so, his right is lost. It cannot, perhaps, properly be admitted that the tenant has a *right* to remove his fixtures. It may more properly be said that the tenant has a privilege, rather than a right, to remove his fixtures; and he must exercise his privilege, if at all, before his interest expires. He cannot do it afterward, because the right to possess the land and fixtures, as part of the realty, immediately upon the termination of the lease reverts to the landlord.²

¹ *Tate v. Blackburn*, 48 Miss. 1; *Taylor's L. and T. Sec. 544*; *Pennybecker v. McDougall*, 48 Cal. 160, in which it is held that a portable fence, made of posts and boards, and resting on the surface, is personal property.

"The legislature of this State cannot authorize parties who have placed improvements, which have become a part of the realty, on public lands of the United States, to remove the same after the lands have become private property." (*Ibid.*)

"If buildings and fences, which are erected on public lands of the United States, are not attached to the soil, and are not a part of the realty, the United States has no interest in them, and they do not pass to a purchaser from the United States, and the person who constructed them has a right to remove them after a patent has issued to the purchaser." (*Ibid.*)

"A wooden building standing upon blocks and rollers, so that it could be removed without disturbing the freehold, and which was built for the purpose of removal, if necessary, may be regarded as a movable fixture and the personal property of the tenant." (*Farrant v. Farrant*, Sup. Ct. Dist. of Col. May, 1875.)

"Whether fixtures are personalty or realty, is a question of intention, and not of physical annexation." (*Seegar v. Pellitt*, Sup. Ct. Term, Feb. 13th, 1875.)

"Under the earlier decisions, physical annexation was undoubtedly the test; but this doctrine no longer prevails. The true rule to be deduced from the authorities is, that it is not the character of the physical connection with realty which constitutes the criterion of annexation, but it is the intention to annex. Where a tenant puts in fixtures or conveniences for his own comfort, the law raises no presumption that he intended them for permanent improvements to be left for the benefit of the landlord, and, as a general rule, he will be entitled to remove them during the term. For any injury to the freehold, by reason of such removal, he is, of course, liable to the landlord in damages. The matter of fixtures should be left to the jury as a question of intention; and to apply the law to certain facts of the case, and instruct the jury that if there was physical annexation the articles could not be removed, is error." (*Ibid.*, citing *Voorhies v. Freeman*, 2 W. & S. 116.) "The criterion of a fixture, in a mansion-house or dwelling, is actual and permanent fastening to the freehold; but this is not the criterion of a fixture in a manufactory or a mill." (*Walker v. Sherman*, 20 Wend. 636; *Farrar v. Stackpole*, 6 Green, 187.)

² *Ibid.*, Sec. 551. "The law imposes no obligation on the landlord to pay the tenant for buildings erected by him on the demised premises. The rule that all

§ 309. Distinction against tenants under farming leases, in the matter of removal of fixtures.—The liberality and consideration to tenants, in permitting the removal of fixtures, appears to have been founded upon motives of public policy for the encouragement of science and the mechanic arts; but from a peculiar distinction against agricultural tenants, they have been, to a great extent, debarred from the privilege of removing their fixtures, *which have been erected for agricultural purposes*, though it is difficult to perceive why farming tenants, as to such fixtures, should stand upon a less favorable footing than mechanics as to trade fixtures, when the relative importance of the two arts is considered; and it is to be observed that the tendency, of late years, in America, has been to ignore such distinction.¹

buildings become part of the freehold has been relaxed only so far as to give the tenant a right of removal while he remains in possession." (Rutter v. Smith, 2 Wall. 491.)

"In *Chilley v. Church-wardens of West Ham*, 32 L. T. (N. S.) 486, the Court of Queen's Bench considered the difficult question as to whether certain objects were fixtures, or mere chattels. It appeared that the premises of a distillery contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls which formed the floors of some of the rooms, and were connected by pipes to other houses; also, reservoirs, and other articles necessary for the process of distilling. They were all heavy, and either unattached, except by the communicating pipes, to the walls or piers, or were fastened by screws for the purpose of being steadied. Each was to be bought and sold as a separate article, and, if all were removed, the premises might be used for other manufacturing purposes. It was held that the articles were not fixtures, but chattels. When the article is attached to the land merely by its own weight, it is usually considered a mere chattel. (*Wiltshire v. Cottrell*, 1 E. & B. 674.) Still, if the intention is to make it a part of the land, it becomes a part of the land. (*D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.) The true rule is expressed in *Holland v. Hodgdon*, L. R. 7 C. P. 328, a very elaborately considered case, where it is laid down that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus, of showing that they were so intended, lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended, all along, to continue a chattel, the onus lying on those who contend that it is a chattel." (Albany Law Journal, July 3d, 1875.)

The right of removal is determined by an entry for condition broken. (*Whipple v. Dewey*, 8 Cal. 86; *Davis v. Eyton*, 7 Bing. 154.) Or by a judgment in ejectment. (*Minshall v. Lloyd*, 2 M. & W. 450; *Penton v. Robart*, 2 East, 88.)

¹ Taylor's L. and T. Sec. 548. "This privilege, however, has not been extended to the case of buildings, out-houses, etc., which have been erected for agricultural purposes; though it is difficult to perceive why such fixtures should stand

upon a less favorable footing than trade fixtures. The industry of the farmer will, of course, be more productive in proportion to the improved condition of his buildings, and his advantages for rearing stock and storing produce; and it seems but a narrow policy which refuses to the agricultural tenant the same protection that is extended to the improvement of the manufacturer."

The distinction is, however, maintained by the common-law authorities. (*Elwes v. Mawe*, 3 East, 38.) But, by English statute, (14 and 15 Vict. Chap. 25) the agricultural tenant is protected in his privilege to remove fixtures from leased land, where he can do so without permanent injury to the realty.

In the United States, the distinction still stands recognized, although innovations are constantly being made upon it. (*Van Ness v. Packard*, 2 Pet. 137; *Whiting v. Brastow*, 4 Pick. 310.)

CHAPTER XXVII.

PARENT AND CHILD.

- § 310. Duty of the father to support his child.
- § 311. The father must educate his children.
- § 312. The contracts of infants are voidable, not void.
- § 313. The parent's right to earnings of his child.
- § 314. The father may emancipate his child.
- § 315. Parent responsible for child's torts, when.
- § 316. Right of recovery for injury to child.
- § 317. Duties of the child to its parent.
- § 318. Transactions, between parent and child, as to strangers.

§ 310. The duty of the father to support his child, while it is of tender years, necessarily results from the relation of the parties to each other and the demands of civilized society; the infant cannot support himself, and there can only be a question as to whether the State or his parents shall do this, for there is somewhat of a duty, both on the part of the commonwealth and of those to whom the child owes its existence, to guard and provide for its necessities through the period of infancy.¹

The natural affections appear to decide the question, and give the desire to the parents to render to their child this service; but, as an abstract proposition, it is difficult to determine how far the law imposes on them the obligation to do so.

The rulings of the English Courts are generally adverse to considering the parent legally bound to support the child, although recognizing the moral one to do so; but the child is regarded as the father's agent, to the extent that he may bind him in procuring necessities for his support, unless the father provide them.²

¹ Parsons on Contracts, Vol. 1, Sec. 299; Kent's Com. Vol. 2, Sec. 189; Paley's Moral Philosophy, p. 233; Taylor's Elements of Civil Law, p. 385.

² Simpson v. Robertson, 1 Esp. 17; Urmstone v. Newcomen, 4 A. & E. 890; Baker v. Keen, 2 Stark. 501; Fluck v. Tollemache, 1 C. & P. 5; Blackburn v. Mackay, 1 C. & P. 1 (1823); Seaborne v. Moddy, 9 C. & P. 497 (1840); Mortimer

In the United States, the decisions are not uniform in character on this point, but the general tenor of them has been to establish the legal liability of the parent for necessities furnished to the infant, on the ground that the moral obligation of the father to provide for his child's necessities is also a legal one, which the Courts may enforce.¹

§ 311. The father must educate his children.—It is the duty of the parent to educate his children, as it is to clothe and feed them; and as he must be the best judge of what is for them proper food and raiment, so upon him, to a great extent, must devolve the duty and responsibility of deciding what studies they shall pursue. He should be held to the performance of this duty, and to the expense of properly schooling the

v. Wright, 6 M. & W. 482, (1840) per Parke, B. "It is a clear principle of law, that a father is not under any legal liability to pay his son's debts."

And in *Shelton v. Spriggett*, 20 E. L. and E. 281, the law is declared to be well settled that, without some contract, express or implied, the father is not liable for necessities furnished to his son.

¹ *Stanton v. Wilson*, 3 Day, 37; In the Matter of *Ryder v. Payne*, 11 Payne, 187; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Buckley v. Howard*, 35 Tex. 565. A father is bound to raise and educate his children at his own expense, and is not exonerated from this liability by the fact that his children have estates of their own, of which he is guardian, unless it appears that he is unable to do so.

Plaster v. Plaster, 47 Ill. 290. Where the Court, in divorce, awarded the custody of the children to the mother, the father was held bound to provide for the support and education of the children.

Hunt v. Thompson, 3 Scam. 180; *Benson v. Remington*, 2 Mass. 113; *Whipple v. Dow*, *Ibid*, 415; *Dawes v. Howard*, 4 *Ibid*, 97. But this doctrine does not stand without contradiction.

See *Gordon v. Potter*, 17 Vt. 350, decided in 1845, per Redfield, J.: "It is obvious that the law makes no provision for strangers to furnish children with necessities against the will of parents, even in extreme cases. For, if it can be done in extreme cases, it can be done in every case where the necessities exist." See, also, *Raymond v. Lloyd*, 10 Barb. 483; *Chilcott v. Trimble*, 13 Barb. 502, and *Kelly v. Davis*, 49 N. H. (1870) 187, in which it was held that a parent cannot be charged for necessities furnished by a stranger to his minor child, except upon the promise of the parent, express or implied, to pay for them.

Such promise is not to be implied from an omission of duty, resting in moral obligation merely.

Parsons on Contracts, Vol. 1, Sec. 306. "The law can hardly be considered as positively settled, either in England or this country. But, resting not so much on direct and specific authorities as on the general character of American jurisprudence on this subject, we would state, as strongly prevailing rules here, that where goods are supplied to an infant which are not necessities, the father's authority must be proved to make him liable; where they are necessities, the father's authority is presumed, unless he supplies them himself, or is ready to supply them." (*Ibid*, Sec. 306, to the same effect.)

child; even if the latter has separate estate, sufficient to provide therefrom means to defray the expense, the accidental circumstance of the child being so situated does not affect the duty which the parent owes to him and to society.¹

This duty extends to such an education as, in the good judgment of the parent, is proper and sufficient for the child, by good judgment being meant such as is exercised by ordinarily prudent persons, and as is commensurate with the means of the father; and where the father's means are small and the child has property of his own, such property may be applied to furnish means for an education above what the father could afford to give.²

The parental authority over a child, together with its custody, is delegated to the teacher for the special purposes of education, and in enforcing necessary rules of discipline the right of punishment is passed temporarily from the parent to the teacher; but this does not deprive the parent of the right to control the studies of the child and of its treatment while with the teacher, except so far as is requisite in the school to maintain classes and maintain good order; the parent has the right to dictate the studies to be pursued by the child, and, to some extent, the mode of pursuing them.³

§ 312. The contracts of an infant are voidable, but not void; that is to say, because a person is not of the age which the law prescribes as that of maturity, he is not abso-

¹ *Buckley v. Howard*, 35 Tex. 576. "Buckley, as the father and natural guardian, was bound, by the obligations both of law and morality, to raise and educate his children at his own expense, and the law gave to him no right to deduct from or cut down the legacy which they received from their mother, for this purpose."

² *Kent's Com.* 193; *Ibid*, 195. "A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen and bequeaths to it a nuisance."

³ *Buckley v. Howard*, 35 Tex. 576.

³ *Morrow v. Wood*, Sup. Ct. Iowa, November, 1874. "A parent in sending his child to school surrenders to the teacher such control over the child as is necessary for the proper government of the school. But where the parent desires that the child shall omit a part of the regular course of study, and so directs him, the teacher has no paramount authority to enforce the study of the omitted part, and corporal punishment of the child for disobedience, under such circumstances, is an unlawful assault."

lately incapacitated from incurring responsibilities by his contracts, entered upon with due deliberation; the liability of an infant is such that he may avoid it, because, for his protection against fraud or undue influence, he is not bound, unless his riper judgment, when he becomes of age, ratifies the agreement, and for this ratification, a mere acknowledgment that the debt existed, or that the contract was made, is not enough; the ratification must be sufficiently formal to show that the mind of maturity has acted upon the subject-matter. It need not be a precise and formal promise; but it must be a direct and express confirmation, and, *substantially*, a promise to pay the debt or fulfill the contract, and it must be apparent that the adult, deliberately, with the knowledge that he is not bound by the promise made by him when a child, ratifies and assumes the obligation, without compulsion to the other party or his agent.¹

§ 313. The parent's right to earnings of the child.—
The father is entitled to the benefit of his minor child's labor,

¹ 2 Kent's Com. Sec. 234 et seq.; Parsons on Contracts, Vol. 1, Sec. 323 et seq.; *Harris v. Wall*, 1 Exch. 122; *Hartly v. Wharton*, 11 A. & E. 934; *Bingham on Infancy*, 45; *Zouch v. Parsons*, 3 Burr, 1794; *Shropshire v. Burns*, 46 Ala. 108. "Contracts of an infant are regarded as voidable only, not void. They are capable of confirmation by acts done in pursuance of them, after the infant has become of age. And any acts which, if done by the infant, after attaining his majority, would render the contract binding on him, will, if done by his executor or administrator, after becoming vested with the infant's estate, render the contract binding on such personal representative."

Kirwin v. Maxwell, 66 N. C. 45. In Iowa, a person who made a contract when an infant cannot disaffirm it if the other party had good cause to believe him of age. (Iowa Revision, Sec. 2541; *Beller v. Marchant*, 30 Iowa, 350.)

Carrell v. Potter, 23 Mich. 377. "An agreement made by an infant, by which he agrees to repay money which he has received, becomes binding upon him if he fails to disaffirm it within a reasonable time after majority." (*Stuckem v. Yoder*, 33 Iowa, 177; *Higley v. Barrow*, 49 Me. 103.) The presumption that one who made a sale of lands when an infant, affirms the same, arises when, after majority, he silently sees valuable improvements made on the property, and it becomes greatly enhanced in value.

Pety v. Roberts, 7 Bush. (Ky.) 410; 2 Kent's Com. Sec. 238 et seq. Resulting from these premises, a minor is not bound by his contract to labor for a specified term; he may quit service before the expiration of his contract term, and recover from his employer the value of the services rendered. (*Ray v. Haines*, 52 Ill. 485; *Derocher v. Continental Mills*, 58 Me. 217.)

But see 2 Kent's Com. Sec. 242. "An infant has a capacity to do many acts valid in law. He may bind himself as an apprentice, or make a contract for service and wages, it being manifestly an act for his benefit; but when bound he cannot dissolve the relation." (*Rex v. Inhabitants of Wighton*, 3 Barn. & Cress. 484; *Wood v. Fenwick*, 10 Mees. & W. 195.)

certainly, so long as the child remains with him and is dependent upon the paternal support; and it is to be presumed that the services of a child, residing with its parent, are rendered to its parent without compensation; and when a child renders service to a parent after the child becomes of age, but while he is a member of the parent's family, and no arrangement or agreement has been made as to payment of such services, and no circumstances are shown from which such circumstances can be fairly inferred, the child cannot recover compensation for such services.¹

For the service of the child rendered to a third person, it would also appear that a like rule prevails; the father is entitled to the child's earnings, and to the value of the labor and services of his children during their minority, certainly, until it is shown, either by circumstances or direct evidence, that the father has relinquished his claim by emancipating the child from parental control and responsibility.²

§ 314. The father may emancipate his child, and, releasing him from parental control, give to the child the power to act for himself and retain his earnings. This power of a father to emancipate his minor child cannot be questioned;

¹ *Prickett v. Prickett*, 20 N. J. Eq. (5 C. E. Gr.) 478; 2 Kent's Com. Sec. 193. "And in consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education, of his infant children, he is entitled to the custody of their persons and to the value of their labor and services." (1 Black. Com. 453; Reeves' Domestic Relations, 290.)

² 2 Kent's Com. 193; *Day v. Everett*, 7 Mass. 145; *Benson v. Remington*, 2 Mass. 113; *Plummer v. Webb*, 4 Mason, 380; *Gifford v. Kollock*, 3 Ware, 45. A father may sue in admiralty for the wages of his minor son. (*Ciffin v. Shaw*, 3 Ware, 82; *The Lucy Ann*, 3 Ware, 253.) A father may receive a local bounty accruing to his minor son, who entered the military service as a volunteer. (*Ginn v. Ginn*, 38 Ind. 526.)

A widow may maintain an action for the value of services rendered by her infant son, who is supported by her, and for whom no guardian has been appointed (*Mathewson v. Perry*, 37 Conn. 435; *Hammond v. Corbett*, 50 N. H. 501; *Simpson v. Buck*, 5 Lans. N. Y. 337); and the fact that the minor is not dependent upon the mother, but contributes to her support, does not alter the rule, or deprive the mother of the right which the law confers. (*Simpson v. Buck*, 5 Lans. N. Y. 337.)

Parsons on Contracts, Sec. 309. "Where the parent is thus obliged to provide for the child a home and a sufficient maintenance, so, on the other hand, he has the right to the custody of the child during his minority, and is entitled to all his earnings." (*State v. Baird*, 3 Green, 196; *McBride v. McBride*, 1 Bush, 15.)

nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter, as against his father, and is, in all respects, his own man.

Emancipation is defined as "an act by which a person who was once in the power of another is rendered free"; and the adjudged cases show that the doctrine of emancipation, as actually administered, is not less comprehensive than the definition.¹

No special form is required to effect such emancipation, nor is it requisite that there should be any special agreement proved between the parties, parent and child; such circumstances as constitute evidence of an understanding between them, to the effect that the father has released the son from parental control, are sufficient.

Every relation among men, whether public or private, may be said to tell its own story; that is to say, it is followed by certain sequences that argue the existence of the relation. If a father, in fact, emancipates his minor child, all observation and experience would lead us to expect corresponding changes in their intercourse with, and in their treatment of, each other; and, such changes being observable, open, and notorious, of such a character as to fairly induce the belief that the son, with the father's consent, acts for himself in business, raises a presumption of emancipation.²

¹ *Morse v. Welton*, 6 Conn. 547; *Jenny v. Alden*, 12 Mass. 375; *Chilson v. Phillips*, 1 Vt. 41; *Gale v. Parrott*, 1 N. H. 28; *Lackman v. Wood*, 25 Cal. 147; *Keen v. Sprague*, 3 Green, 77. A father, acting in good faith, may—though insolvent at the time—make a valid gift to his minor son of his time and future earnings. (*Atwood v. Holcomb*, 39 Conn. 270.) "A father may allow his minor child to contract for himself, and hold his wages; and, after they are earned, cannot withdraw his consent." (*Torrens v. Campbell*, 74 Penn St. 470.)

² 1 *Parsons on Contracts*, Secs. 310-11; *Jenny v. Alden*, 12 Mass. 375; *Varney v. Young*, 11 Vt. 258; *Bray v. Wheeler*, 3 Williams, 514; *Cannover v. Cooper*, 3 Barb. 115; *Cloud v. Hamilton*, 11 Humph. 104; *Whiting v. Earl*, 3 Pick. 301; 1 *Black. Com.* 453; 2 *Kent's Com. Sec.* 194, Note a. A father consented, in good faith, that his minor daughter should receive to her own use sums which she might thereafter earn by sewing. Held, that money thus earned by the daughter, while continuing to receive support from her father and to act as his housekeeper, was not subject to the payment of the father's existing debts. (*Johnson v. Silsby*, 49 N. H. 453.)

A father who, when able to support his minor son, forces him to labor abroad

§ 315. Parent responsible for torts of child, when.

—A father is not to be held responsible for the torts of his child, unless in such cases as he may reasonably be inferred as having assumed such responsibility by inducing the commission of the wrong. The Courts have generally manifested considerable reluctance to hold the father liable as a trespasser for the wrongful acts of his children, and there is apparent a desire to check the tendency of juries to hold the father liable for whatever evil his son may do.¹

The relation of a parent to his child in the matter of such responsibility differs materially from that of a husband to his wife. In the latter instance, he may be held for injuries committed by her, but such is not the effect of the former relation. The husband, under the rules of common law, has the right not only to all the property, but the fruits of the labor, of the wife, while, as to the child, the father has but little more than the right to claim his wages.

It has been held, in a few instances, that the father may be sued in trespass for an injury committed by his son, when the act complained of was committed in the father's presence by the son, and this is probably the extent to which the implied assumption of responsibility can safely be carried;² and the rule now appears to be settled that from the existence of the relation of a father to his child alone no responsibility for the torts

for a livelihood, is not entitled to his earnings. The law then implies an emancipation; and the son may maintain an action for money had and received, if the father appropriates the earnings to another use than that for which the son delivered them to him. (*Farwell v. Farwell*, 3 Houst. [Del.] 633.)

And it has been held that an infant, whose father is dead, and whose mother is married again, is entitled to his earnings. (*Freto v. Brown*, 4 Mass. 675.)

But it is held that the emancipation of an infant by his father does not enlarge the child's capacity to make valid contracts, (*Person v. Chase*, 37 Vt. 647) nor vacate the rule that estoppels do not apply to infants. (*Lackman v. Wood*, 25 Cal. 152-3.)

¹ *Moon v. Towers*, 8 C. B. (N. S.) 611; *Strahl v. Levan*, 39 Penn. St. 177; *Lashbrook v. Patten*, 1 Duval, 316; *Cowden v. Wright*, 24 Wend. 429.

² In Missouri, it was decided that a father is not responsible for an assault committed by his infant son upon the child of a neighbor, unless it was established that the boy was of a vicious disposition and habits, and that the father knew it at the time. (*Baker v. Haldeman*, 24 Mo. 219.)

So, in New York, the same rule was given in a case where defendant's minor daughter, in the father's absence, and without his authority or approval, set a dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was thereby bitten and killed. (*Tift v. Tift*, 4 Denio, 175.)

of the latter can be imposed upon the former.¹ An opinion appears to have prevailed, to some extent, that a father must answer for all the civil injuries inflicted by his child, and we may suppose, therefore, that there is some foundation for this sentiment in the common sense of mankind; but our unwritten law imposes no such liability, and in view of the rulings of the Courts it must be regarded as without foundation.²

§ 316. Right of recovery for injury to child.—Where a child suffers wrong he may maintain his action for damages, and besides this, the parent may claim indemnity for such loss as he may suffer by deprivation of the services and labor of the child, together with expenses incurred in illness caused by the injury.

The common-law rule puts the parent's right to recovery for injuries to the child upon the same basis as that of the master when he is deprived of the services of a servant, and limits him to compensation only for such loss, with necessary expenses incurred in cure of the injured person, making the loss of services the gist of the action; so that if the child is too young to be of service, or is by any cause incapable of performing any services, the foundation fails, and there may be question whether, in view of the fact that from extreme youth or incapacity there can be no element of service, the father could even maintain a special action for necessary expenses by him in having a child cured who could not act the part of a servant.³

In the United States, the rule is more liberal toward the parent, and, because of the duty which all laws of nature and

¹ *Schouler's Dom. Rel.* 361-2; *McManus v. Prickett*, 1 East, 106; *Foster v. Essex Bank*, 17 Mass. 479; *Campbell v. Stakes*, 2 Wend. 187; *Bullock v. Babcock*, 3 *Ibid.* 391.

² *Paulin v. Howser*, 63 Ill. 315, which was a suit for damages against the father for injuries by a dog being set upon a hog by defendant's son. The language of the decision is: "A father is not, nor can he be, held responsible for the unauthorized trespasses of his minor children. In that respect, the child occupies the same relation to the father as does a servant. He is liable for the acts of either when performed under his directions or in the course of their general employment; but not for their trespasses committed independent of their employment, or not under directions."

³ 2 *Hilliard on Torts*, 518-29; *Addison on Torts*, 697; *Grimell v. Wells*, 7 M. & Gr. 1041; *Rogers v. Smith*, 17 Ind. 323; *Sykes v. Lawlor*, 49 Cal. 237; *Dennis v. Clark*, 2 Cuah. 347; *Hall v. Hollander*, 7 Dowl. & Ry. 133; 4 *Barn. & Cres.* 660; *Schouler's Dom. Rel.* 351-2.

society recognize as imposed on the parent, of properly caring for his child when it is ill, he who adds to the care and expense which these laws impose must bear the additional expense in cases where the child himself could maintain the action.

The departure from the common-law rule has, however, been made with no inconsiderable degree of hesitancy and caution, the Courts in America only yielding after repeated attacks upon the principle involved; but the progress toward recognition of the rights of the parent has been steady, until they are now fully established. Thus, in a case where a child, too young to do any labor, was injured by a mare, alleged to be vicious, the father, in his own name, brought an action for damages; defendant urged the common-law rule, but the Court held it not to be applicable in Massachusetts, and decided that "if a legitimate infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured by a third person, or by a mischievous animal belonging to a third person, under such circumstances as give to the child himself an action against such person for the personal injury, and the father is thereby put to trouble and expense in the care and cure of the child, he may maintain an action against such person for an indemnity."¹

§ 317. The duties of the child to its parent are naturally of a less onerous character than such as are imposed upon the

¹ *Dennis v. Clark*, 2 Cush. 347; *Schouler's Dom. Rel.* 352; *Sykes v. Lawlor*, 49 Cal. 236. "The current of English authorities is to the effect that, in an action by a parent for injuries to his minor child under his care, the gravamen of the action is the loss of service, as incidental to which he may recover the expense of nursing and healing the child. But if the child be of such tender years that it was incapable of rendering any service whatever, there could be no recovery, even for the expenses. But, in this country, a more liberal rule has been adopted; and the best considered cases hold that, inasmuch as it is a duty enjoined by the law of the land, as well as by the laws of nature, upon the parent to care for and heal his injured minor child, he who willfully or negligently occasioned the injury should be held responsible for the expenses incurred, without reference to the capacity of the child to render service to the parents."

Karr v. Parks, 44 Cal. 46, in which, moreover, it was held that: "Where an infant child sues, by her father as guardian, for damages for suffering and deformity caused by the act of a vicious animal belonging to defendant, and recovers judgment, such judgment is not available as a bar, or admissible in evidence, in a suit brought by the father in his own name for services rendered and expenses incurred in the care of the wounds inflicted upon the child."

father toward his offspring. As has been seen, the services of the child during minority, in such employment as he may be able to engage in, consistent with proper educational demands upon his time, are to be given to the parent, and generally it may be said that upon children the law enjoins obedience and assistance to their parents during minority, and gratitude and reverence during the rest of their lives.

The obligation of a child to support its parent in old age or infirmity is almost entirely a moral one; and as such, there being no pre-existing legal liability, it cannot legally be enforced, except in the few States whose statutes supply the defect of the common law to oblige the child, when of age, and able so to do, to support its parent, when the latter, from poverty, age, or infirmity, cannot procure the means of a livelihood.¹

§ 318. Transactions between parent and child, as to strangers.—Transactions of parent and child in business, where-in third parties are interested, may raise questions of interest from the peculiar relations existent between them.

Thus, in a recent case, the proposition was stated, and urged

¹ 2 Kent's Com. Sec. 208. "The laws of New York have, in some small degree, taken care to enforce this duty, not only by leaving it in the power of the parent, in his discretion, totally to disinherit, by will, his ungrateful children, but by compelling the children (being of sufficient ability) of poor, old, lame, or impotent persons (not able to maintain themselves) to relieve and maintain them. This is the only legal provision made—for the common law makes none—to enforce a plain obligation of the law of nature." (*Edwards v. Davis*, 16 Johns. 281; *Rex v. Munden*, Str. 190.)

In Massachusetts, the statutory provision is very broad: "The kindred of any such poor person, if he have any in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living within this State, and of sufficient ability, shall be bound to support such pauper in proportion to their respective ability." (Rev. Stat. Mass. Chap. 46, Sec. 5.) But such proceedings as are prescribed by the statute must be had, and strict compliance with the law shown, as it is in derogation of the common law, at which a son is not liable for the support of an infirm and indigent parent. (1 Parsons on Contracts, Sec. 312; *Edwards and Wife v. Davis*, 16 Johns. 281.) "There is no common-law obligation by which a child is liable to support an indigent parent; but the liability of the child is created solely by statute, and therefore the law does not imply a promise from the child to pay for necessities furnished without his request to an indigent parent, and the natural obligation can only be enforced in the mode pointed out by the *act for the relief and settlement of the poor*." But see *Succession of Lyons*, 22 La. An. 627.

with great ability, that a father, being intrusted with the sale of property, cannot sell it to his son.

That an agent cannot become the purchaser of property which has been placed with him for sale results from the peculiar trust reposed in him, and the antagonism to that trust which may be assumed from his being, in personal interest, adverse to the duty to obtain the highest price to be got for the property.

This restriction can only be removed by the agent fully informing his principal of all the facts, giving his opinion truthfully and with candor as to value and price obtainable, and so openly acting in the premises as to rebut the presumption that the principal relied upon any thing, or information, other than such as both parties had in common and alike.

But if the agent become in any way, directly or indirectly, the purchaser, without such a change of the general relation, he becomes a trustee for the principal, and will be deemed to hold the property in trust for him, and may also be held responsible in damages.

Without such entire candor, fraud in the purchase will be presumed; it will not be necessary to show it affirmatively, and the fact that the agent paid a fair price is unimportant; from such a purchase the law implies fraud.¹

This restriction extends not only to the agent himself, but to his clerks and employees; the rule, as laid down by the standard authorities, is that the disability extends to all persons who, being employed or concerned in the affairs of another, acquired a knowledge of his property. It would work an entire abrogation of the rule to hold the principal subject to its operation, and exempt his clerks and agents from its effect, by opening the door to its evasion and destroying its vitality and virtue.²

¹ *Davoue v. Fanning*, 2 J. Ch. 260; *Claflin v. F. & C. Bk.* 25 N. Y. 293; *Case v. Carroll*, 35 *Ibid.* 388; *Conkey v. Bond*, 36 *Ibid.* 429. "An agent, under a general authority to purchase, cannot buy from himself, without the knowledge or consent of his principal. Such a transaction is a breach of duty, and the contract is subject to rescission, irrespective of any question of intentional fraud, or actual injury."

² *Ex parte Barnett*, 7 *Jurist*, 116; *Owen v. Foulkes*, 6 *Ves.* 630*n.b.*; *Ex parte James*, 8 *Ibid.* 337; *Ex parte Linwood*, 8 *Ibid.* 343.

Gardner v. Ogden, 22 N. Y. 327. "The clerk of a broker, employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such relation of confidence to the latter that, if he be-

A father, where acting as an agent for the sale of property, may, however, sell to his son, although, from the relationship and intimacy of the parties, imputations of fraud are liable to be made. But if the fact appears that, from his relation, the son acquired from his father such information as he alone could impart, by committing a fraud on the principal, or if it appear that, by access to papers in the father's possession, or any other means, the son, through such relationship, became aware of facts which induced the purchase, there appears to be no good reason why the rule affecting clerks and employees would not apply, and the circumstance that a son buys property of a father, who is, as to it, the broker for another person, would be one naturally pointing suspicion, and may be regarded upon allegations of fraud by the broker in making the sale.

The rule does not appear to be so well settled as is to be desired, but the latest case goes to the length of deciding that the relationship of a father to his son will not, of itself, invalidate a sale made by the father to the son, without proof of fraud. As before seen in the case of a clerk or employee of the agent, a sale made to him is presumed to be fraudulent, or perhaps, more strictly speaking, the rule is as with respect to a trustee dealing with the property of the principal, fraud is not a necessary ingredient in testing the validity of the transaction;¹ but the general reasoning appears to warrant the distinction made, and it is but reasonable to consider that the son may be held to buy upon his own judgment and information, not obtained through the relationship; while as to the clerk employed in the agent's affairs, the presumption would be that he was aware of the advantages of the purpose, through his employment about the affairs of the vendor.²

comes the purchaser, he is chargeable, as trustee, for the vendor, and must reconvey or account for the value of the land."

In this case, the clerk was compelled to reconvey so much of the land as remained in his hands, and to account for the proceeds of what he had sold, although the price paid by him was fair and adequate, and the broker was exonerated from fraud in the sale.

¹ *Boerum v. Schenck*, 41 N. Y. 182; 1 Story's Eq. 322; *Coal Co. v. Sherman*, 30 Barb. 553.

² *Lingke v. Wilkinson*, 57 N. Y. 445. "The relationship of father and son will not, of itself, invalidate a lease by the former, as agent or trustee, to the latter, or authorize the disaffirmance of the transaction by the principal or *cestui que*

trust. The fact of the relationship is a material one in determining whether there was fraud in fact in the transaction, but it does not, *per se*, constitute fraud in law, or bring the case within the rule prohibiting an agent or trustee from dealing with the subject-matter of the agency or trust for his own benefit."

The opinion of the Court is not unanimous on the point, two of the five commissioners dissenting, and, by elaborate opinions, they rank the son, under such circumstances, with clerks in the agent's office, and, in the opinion of one commissioner, (Reynolds, 57 N. Y. 455) he holds that the case does not differ materially from that of *Gardner v. Ogden*, *Supra*, in which the clerk bought, and that fact alone was held sufficient to invalidate the sale.

CHAPTER XXVIII.

GUARDIAN AND WARD.

- § 319. The relation of guardian and ward.
- § 320. General duty of guardian.
- § 321. Jurisdiction of Courts of Chancery.
- § 322. The guardian represents the Court, when.
- § 323. The guardian must take no chances with ward's property.
- § 324. Neglect, by guardian, to invest trust funds.

§ 319. The relation of guardian and ward closely resembles that of parent and child. Inasmuch as children, during their minority, are incapacitated legally to transact business, make contracts, and otherwise guard their interests, it is necessary that some adult should be charged with the care of their persons and estates.

Guardianship usually takes place upon the death of the father, but it may exist during the lifetime of the parents, upon their becoming unable to care for their children, by reason of insanity, or, without any incapacity on the part of the parent, when the child has property which requires care or attention.¹

§ 320. General duty of guardian.—The relation of guardian and ward differs from that of parent and child in that it is not one of natural occurrence, and, being the creature of law, is governed more strictly by legal rules. The trust assumed by the guardian is a voluntary one on his part, is one of the most important and delicate known to the law, is large and comprehensive in its efficiency, and the Courts are extremely watchful to prevent any abuse of circumstances by advantage being

¹ 2 Kent's Com. 218. "The relation of guardian and ward is nearly allied to that of parent and child. It applies to children during their minority, and may exist during the lives of the parents if the infant becomes vested with property; but it usually takes place on the death of the father, and the guardian is intended to supply his place."

taken by the guardian, to his own profit, at the expense of the ward, or of his estate.¹

§ 321. The jurisdiction of the Courts of Chancery over the persons and property of infants is established by precedent so ancient as to be obscure as to its origin, but the doctrine now commonly maintained is that the general care and superintendence of the persons and property of infants vested in the crown, as *parens patriæ*; and, as the exercise of this prerogative partook more of the nature of a judicial administration of rights and duties in *foro conscientiæ* than of a strict executive authority, it would naturally follow, *ea ratione*, that it should be exercised in the Court of Chancery as a branch of the general jurisdiction originally confided to it.

The jurisdiction of the Court of Chancery extends to the care of the person of the infant, so far as is necessary for his protection and education, and to the care of the property of the infant, for its due management and preservation, and the proper application of it to his maintenance and education.²

In the statute laws of some of the United States, provision is made for the exercise of this jurisdiction over the estates and persons of minors by Courts specially designated for that and other similar purposes. This is done, generally, for convenience, and the more perfect application of the rules and principles of

¹ Parsons on Contracts, Sec. 137. "The guardian is held, in this country, to have only a naked authority, not coupled with an interest. His possession of the property of his ward is not such as gives him a personal interest, being only for the purposes of the agency; but, for the benefit of his ward, he has a very general power over it. He manages and disposes of the personal property at his own discretion, although, as we have already intimated, it is safer for him to obtain the authority of the Court for any important measure. He may lease the real estate, (the lease not to continue beyond the ward's majority) if appointed by will or by the Court, but the guardian by nature cannot. He cannot, however, sell it without the leave of the proper Court."

² 3 Black. Com. 427; *Williamson v. Berry*, 8 Howard, (U. S.) 425; *McCord v. O'Chiltree*, 8 Blackf. 15; *Maguire v. Maguire*, 7 Dana, 181; *Lyne v. Countess of Shaftsbury*, 2 P. Wms. 118, 119; *Cary v. Bertie*, 2 Vern. 333, 342; *Story's Eq. Jur. Vol 2, Sec. 1327 et seq.*; *Ibid*, Sec. 1338. "The Court of Chancery will appoint a suitable guardian to an infant, where there is none other, or none other who will or can act, at least where the infant has property; for if the infant has no property, the Court will, perhaps, not interfere. It is not, however, from any want of jurisdiction that it will not interfere in such a case, but from the want of means to exercise its jurisdiction with effect; because the Court cannot take upon itself the maintenance of all the children in the kingdom."

equity jurisprudence and practice, by a subdivision of the duties of the Courts, and specifically assigning to the special Court the labor which can better be done by it than by a Court of general chancery jurisdiction; but this assignment of duties does not, as a rule, oust the jurisdiction of the general Chancery Courts, but their aid may be invoked whenever there are peculiar circumstances of embarrassment which are liable to render inefficient the Court of limited jurisdiction.¹

§ 322. The guardian represents the Court, when.—

Courts of Chancery, or special Courts for such purpose created, have the general control and care of the persons and property of children whose misfortune it has been to lose their natural protectors, the parents. It is the province of such Courts to inform themselves of the details and circumstances of the lives and estates of such children who are, in legal parlance, the "wards" of the Court. In the management, and especially in the sale, of property belonging to such wards, it is the duty of the Court having the matter in charge to surround the infant with all known safeguards and means of prevention to imposition upon them, or jeopardy to their interests.

From the nature of this duty it is impossible that it can, as a general rule, be performed by the Court directly, and to carry into effect the desires of the Court in the premises, guardians are appointed, who are the creatures of the Court, to carry into effect its plans and intentions.

As to the property of the infant, the Court ascertains its character and value by sworn statements, examination of witnesses, and such proceedings of a similar nature as may be requisite to ascertain the facts; and by inventories and appraisements by competent and disinterested parties, records are made, and kept by the Court, of whatever property goes into the guardian's hands. It is the duty of the Court, as the primary guardian of the infant, to maintain a constant and watchful supervision over the property, to order leases and sales of it

¹ *Brown v. Snell*, 57 N. Y. 286. "A special guardian of an infant, appointed in proceedings for the sale of the real estate of the latter, owes a duty of absolute loyalty to the interests of the infant, so far as relates to the proceeds of the real estate that comes to his hands; he cannot, of right, when cited to account, hold the position of an opposing party."

when requisite, apply proceeds to the benefit of the ward, and see that all funds are promptly invested in such manner as to be secure and beneficial to the child.

The guardian is directly responsible, and always answerable to the Court, for his administration of the business intrusted to him, and—in addition to his personal responsibility—is, for the safety of the ward, required to give bond, with such sureties as the Court may direct, conditioned for the faithful performance of the trust reposed, for the paying over, investing, and accounting for all moneys, and for the observance of the orders and directions of the Court in relation to the trust.¹

§ 323. The guardian not justified in taking risks.—To secure the proper execution of the trust which the guardian assumes over the person and estate of his ward, the law has been exceedingly watchful; the guardian is held to the most strictly honest discharge of his duty; he can take no risks with the property of his ward, and he cannot act in the matter of the affairs intrusted to him with any reference to his own profit or advancement, or even for his own protection from loss, without due consideration of the interests of the ward being first had in the premises. He must not only neither make nor suffer any waste of the inheritance, but must render rigid account of his expenditures, and of the disposition of the personal estate of the ward. Of the money belonging to the estate, he must make such use as a prudent man would ordinarily do of his own funds; must not loan them, or make investments recklessly; and if he act with the funds in any way without the leave of the Court, or upon insufficient security, he is liable for losses which occur by reason of his doing so.

These general rules apply, not only while the appointment of guardian lasts, but even after it has ceased, by the majority of the ward or otherwise, for a reasonable length of time. The law is jealous of the rights of the ward, and as the guardian may have acquired such special information as to the business that he has an unfair advantage, or his influence over the ward may not have ended, and the guardian is precluded from dealing with the ward, or his estate, until the relation has ceased

¹ Field v. Mayor, Etc. 6 N. Y. 179; Kelly v. Thayer, 34 How. 164.

for such length of time as to establish an equality between the parties as to the subject-matter of the trust.¹

§ 324. Neglect by guardian to invest trust funds.—

Any negligence on the part of the guardian to properly use the property of the ward, or any misappropriation of the assets received by the guardian under the trust, entitle the ward to an action against him, either immediately by *prochier ami*, or after the ward reaches his majority. So, if the guardian uses the money of the ward upon his own ventures, or invests it in trade, the ward may elect either to treat the transaction as his own, claim the benefit of the investment, or the profits of the trade, or the principal with compound interest, in lieu of the profits, if the guardian will not disclose what the profits have been.

And if the guardian neglects to put out at interest the ward's money, and for an unreasonable length of time allows it to lie idle, or mingles it with his own, he will be charged with interest, and in cases of gross negligence the Court will impose upon him the payment of compound interest. It is not enough for

¹ 2 Kent's Com. 225; *Hassard v. Rowe*, 11 Barb. 24; *Torrey v. Black*, 65 Barb. (N. Y.) 417. The administrator of the deceased father's estate cut timber from the land by consent of the widow, who was the son's guardian; the son, as heir of his father to the land, attaining majority, sued the administrator for the value of the wood; the administrator, in defense, pleaded the permission given by the guardian. Held, that the guardian could give no such license, and the general rule was declared, that a guardian can do nothing to prejudice the rights of the ward. (*Jackson v. Sears*, 10 Johns. 435-441.)

Cureton v. Watson, 3 S. C. (New Series, 1872) 451. A guardian, in 1861, sold his ward's mortgage, and took in payment a promissory note, which was paid in 1863, in Confederate money. Held, that the guardian was liable to the ward for the amount of the mortgage.

But in *State v. Morrison*, 68 N. C. 162, a guardian in good faith sold, on a credit of twenty days, the cotton of his wards, taking from the buyer his note without security. At the time of the sale the buyer was solvent, and owned real estate, but before the note was collected became insolvent, and unable to pay the note. Held, that he was not liable to his wards for the price of the cotton. (And to same general effect, see *State v. Morrison*, 68 N. C. 162.)

2 Kent's Com. 229. "The guardian's trust is one of obligation and duty, not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for any benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit."

But in a late case it was held, that a guardian who is a merchant may, if he acts in good faith, supply the necessary wants of his wards from his own store, and may charge a reasonable profit on them. (*Moore v. Shields*, 69 N. C. 50.)

the guardian to show that he has safely kept the money and is ready to turn it over; his position is not unlike that of him who, in the parable, was intrusted with money by his Lord: it is not enough that he bury it in a napkin, and after many days return it as it was intrusted to him, without increase.¹

¹ 2 Kent's Com. 231; *Docker v. Simes*, 2 My. & K. 665.

In the matter of *Jackson*, 1 Tucker, Surr. (N. Y.) 71, a general guardian held liable for moneys belonging to his ward, of which the guardian had been robbed. It is his duty to prosecute for its recovery.

Owen v. Peebles, 42 Ala. 341. A guardian is responsible for interest if he keeps the ward's funds unemployed when they could have been safely invested. It is his duty to make investments if it can be safely done by the exercise of due diligence. This is the law, independently of the statute. He cannot, therefore, be relieved from interest by a mere showing that the funds have not been used. (*Bryan v. Craig*, 12 Ala. 354; *Allen v. Martin*, 36 Ala. 330.)

But a guardian is not chargeable with compound interest on money on hand where he has been guilty of no misconduct. Nor should he be charged even with simple interest if he proves that he could not, by the exercise of reasonable diligence, make a proper investment; unless there was a conversion by him of the money. (*Brand v. Abbotts*, 42 Ala. 499.)

CHAPTER XXIX.

APPRENTICE AND MASTER.

- § 325. The relation of master and apprentice.
- § 326. The father's power to bind his son apprentice.
- § 327. Statutory provisions as to master and apprentice.
- § 328. Who may assent to binding out a child.
- § 329. The contract of apprenticeship.
- § 330. Persuading apprentice to leave his master.

§ 325. The relation of master and apprentice is like that of guardian and ward, and, perhaps to a greater extent, resembles that of parent and child. For the purpose of the child's being educated in some one of the useful arts, trades, or callings, the parent delegates his authority over the child to some person who is engaged in the avocation which the parent desires his child to become learned or skillful in, and the person to whom the parent relinquishes his control of the child naturally becomes, to a considerable extent, *in loco parentis*.¹

§ 326. The father's power to bind his son as apprentice.—At common law, a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may assign those services to others, for a consideration, to inure to himself. He may contract that his minor son shall labor in the service and employment of others for a day, a month, or any longer term, so that the time does not exceed the period of the child's emancipation from the father, which may take place as well on the father's death as on the son's arriving at the age of twenty-one years.²

¹ 1 Bouv. Law Dic. 692.

² Day v. Everett, 7 Mass. 144. "At common law, a father may assign the services of his minor son to another, for a consideration, to inure wholly to the father, and this for a longer or shorter term, limited, however, by the son's minority and the life of the father." But the later English cases confine this right to dispose of the child's services to such cases as those in which the assent of the child has

§ 327. Statutory provisions as to master and apprentice.—The statutory enactments of the United States bear, each to the other, a general resemblance, and are, as a rule, substantially the same, the application differing only to correspond to the requirements of the residents in the different parts of the country; the general provisions are, that infants, if males, under twenty-one, and females, if unmarried, under eighteen, may be bound by indenture, of their own free will, and by their own act, to a term of service, as apprentice in any trade, profession, or employment, having first in due form procured the consent of the father, mother, guardian, or other person or persons who are lawfully charged with their care and maintenance.¹

been obtained to the arrangement, and do not permit the father to deal with the child as a chattel, or dispose of his services without consulting his wishes. (*The King v. Inhabitants of Cromford*, 8 East, 25.) “Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving, for five years, and find utensils, and the son should receive half his earnings, and the master the other half, under which the boy served out the time as an apprentice, held, that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master; but the son's service, being, in fact, merely voluntary, was no apprenticeship in point of law, and consequently no settlement could be gained by the son serving his master under such a contract.” (*The King v. Inhabitants of Arnesby*, 3 B. & Ald. 584; *Ford v. McVay*, 55 Ill. 119.)

¹2 Kent's Com. 263 et seq.; 2 Parsons on Contracts, 50. In Arkansas, the approval of the Probate Court is necessary to the validity of an indenture of apprenticeship of a child by his father.

In Delaware, it has been held that an indenture which is not authorized by the statute is voidable only, not void. (*Luby v. Cox*, 2 Harr. 184.)

An indenture of apprenticeship executed by a minor to be binding on him must be sanctioned by his parent or guardian. But if such contract has been fairly executed and is apparently advantageous to the minor, he cannot, after a partial performance, rescind the contract, and recover for the value of his services (*Harney v. Owen*, 4 Blackf. 337; *Page v. Marsh*, 36 N. H. 305); but being voidable, it will be avoided by any act which shows clearly his intention not to be bound by it. (*Brown v. Whittemore*, 44 N. H. 369.)

But an indenture signed by the parent only, and not by the child, held to be void. (*Ivins v. Norcross*, 3 New Jersey L. 169.)

So in New York, in the leading case of *Matter of McDowle*, 8 Johns. 328, the rule has been laid down that, under the statutes of that State, when a father binds his child apprentice the indentures must be executed by the child, or they will not bind him, although, at common law, a parent might bind his infant an apprentice. The later English cases also lean to the reasoning that the parent and child must join in the indentures. But the father may be bound by the covenants in the indentures, although the child is not. The want of the execution by the infant is a defect of which the child alone can avail himself. (*Matter of McDowle*, 8 Johns. 328; *Guilderland v. Knox*, 5 Cow. 363; *People v. Pillow*, 1

§ 328. Who may assent to binding out a child.—The custody of the child, sufficient to warrant an assent to his or her becoming bound for a term of service as apprentice, is not confined to the parents or guardians; the overseers of the poor, or the officers of the village, town, or city, who by their official position and duties are charged with the care and maintenance of paupers, may assent lawfully to the apprenticeship of minor children who, for want of competent natural protectors, are a charge upon the community.¹

§ 329. The contract of apprenticeship is generally in writing, and the current of authorities is to the effect that it must be so. It is most frequently accompanied by all the formalities of a deed, and is to be construed and enforced, as to all the parties, by the rules of law governing contracts.²

This contract is that the apprentice shall serve his master faithfully during the term, and the master, on his part, covenants that he will teach the apprentice his trade, or give to him such opportunities of learning the art or profession to which the master is devoted as will enable the apprentice to become skilled or learned therein.

The master is entitled to the custody of the apprentice, and is charged with his care and maintenance, and he is therefore bound, in case of sickness, to provide his apprentice with proper medicine and attendance.³

Sandf. 711; *Commonwealth v. Jennings*, 1 *Browne*, [Penn.] 197; *Doane v. Corel*, 56 *Me.* 527; *Commonwealth v. Atkinson*, 8 *Phil.* [Penn.] 375; *Ford v. McVay*, 55 *Ill.* 119; *Hudson v. Warden*, 39 *Vt.* 382; *Van Dorn v. Young*, 18 *Barb.* 286.)

¹ It would seem that where an infant is bound out as apprentice by the overseers of the poor, as he may be where he is the child of paupers having a settlement in the town, the assent of the child is not requisite. (*Commonwealth v. Jones*, 3 *Serg. & R.* 158; 2 *Kent's Com.* 264; *Bowes v. Tibbetts*, 7 *Me.* 457.)

But precedents have established the propriety, if not absolute necessity, of the child in person being heard as to his settlement by such as have him in charge as a town pauper, and he should not be so bound out without his next friend, or person with whom he reside, if any such there be, having been summoned to show cause why the child should not be so disposed of. (*Curry v. Jenkins*, *Hard.* [Ky.] 493; *Rachel v. Emerson*, 6 *B. Mo.* 280; *Owens v. Chaplain*, 3 *Jones' [N. C.] L.* 323; *Case of Ambrose Phill*, *N. C.* 91.)

² Articles of apprenticeship must be in writing. (*Tague v. Hayward*, 25 *Ind.* 427; *Bolton v. Miller*, 6 *Ind.* 262.)

³ *Hall v. Rowley*, 2 *Root*, (Conn.) 161. "If a father engages by parol that his son shall serve another for a longer time than one year, the contract is void by

From this relation of the parties, it would appear that the master occupies a relation to his apprentice so far like that of parent to child that he may be permitted to enforce his authority, and compel compliance to his reasonable commands, by moderate correction for negligence or misbehavior.¹

§ 330. Persuading apprentice to leave his master.—

The enticement of the apprentice from the service of his master is actionable, and not only a party who seduces an apprentice from his service is liable, but any person who employs an apprentice, even though he have no knowledge that he occupies that relation to another, must answer to the master for the value of the services rendered by the apprentice.² The mere abandonment of service by the apprentice does not avoid the apprenticeship; nor can the master release himself from his obligation without the assent of the parent with whom he has

the Statute of Frauds, and neither party can maintain an action for breach thereof, though it has been in part performed on both sides." (*Squires v. Whipple*, 1 Vt. 69; *Peters v. Lord*, 18 Conn. 337; *Commonwealth v. Atkinson*, 8 Phil. Penn. 375; 2 Kent's Com. 264.) "It is a settled principle of the English and American law that the relation of master and apprentice cannot be created, and the corresponding rights and duties of the parent transferred to a master, except by deed." (Citing *Castor v. Aicles*, 1 Salk. 68; *King v. Inhabitants of Bow*, 4 Maule & S. 383; *Commonwealth v. Wilbanks*, 10 Serg. & R. 416.) Slight informalities, however, will not make the indenture void. *Fowler v. Hollenbeck*, 9 Barb. in which the indentures did not disclose any trade, calling, or profession in which the minor was to be taught, was held not to be fatally defective. So, in *Maltby v. Harwood*, 12 Barb. 473, it was held that, even if the indentures were so far defective as to vitiate them as such, they might be sufficient to prescribe and measure the claim of each of the parties against the other, if they have lived under the indentures as master and servant.

2 *Parsons on Contracts*, p. 50; *Maltby v. Harwood*, 12 Barb. 473. "The master is bound, from the very nature of the relation between master and apprentice, to pay for medical attendance on the apprentice." (*Easley v. Craddock*, 4 Rand. [Va.] 423.) But not where the master did not call in the physician, or the attendance was not at the master's house. (*Percival v. Nevill*, 1 Nott & M. 452; *Dunbar v. Williams*, 10 Johns. 249.)

¹ 2 Kent's Com. 265. "The master may correct his apprentice, with moderation, for negligence or misbehavior." (*Commonwealth v. Baird*, 1 Ashm. 267.)

² *Bardwell v. Purrington*, 107 Mass. 427. "The employment by a person of an absconding apprentice, and the fact that he paid him for his services, afford no defense to an action against such person by the master for the value of such services." (*United States v. Anderson*, Cooke, Tenn. 143.)

Where an apprentice is employed by a third person, without the knowledge or consent of his master, the master is entitled to all his earnings, whether the person who employed him did or did not know that he was an apprentice. (*McKay v. Bryson*, 5 Ired. L. 216.)

contracted, or leave of the Court, or overseers of the poor from whom he has received the charge.¹

But the parent, or other party to the indenture, who appears and acts for the child, and assents to the contract, is bound in good faith, and to the best of his ability, to enforce it, and to keep the apprentice subject to the master's control.²

¹ *Cockran v. State*, 46 Ala. 714. "The covenants that an apprentice shall serve, and that the master shall teach and provide, etc., are independent; so that if an apprentice, by reason of incurable illness, becomes unable to learn, etc., the master cannot put an end to the contract by his own authority." (*Powers v. Ware*, 2 Pick. 451; *Clancy v. Overman*, 1 Dev. & B. L. 402.) But see *Barger v. Caldwell*, 2 Dana, 131; *Wright v. Brown*, 5 Md. 37, in which it was held that if the apprentice is incapable of learning the trade, the obligation of the master is discharged.

² *Van Dorn v. Young*, 13 Barb. 236. "The parties to a contract of apprenticeship, being the father and master, bound themselves 'so far as it was in their power to see the contract fulfilled.' Held, that it must be deemed to have been the intent of the parties to limit their obligation to their legal liability. And in an action by the master against the father on such a contract, it appeared that the son, after serving several years, had left his master and refused to serve under him any longer. Held, that the defendant was bound to do what he had the legal power to do in the premises; and it appearing that he had refused to do anything to compel or induce his son to return, that the obligation on his part was broken." (*Bruce v. Mathews*, 2 Bibb, 294; *Powers v. Ware*, 4 Pick. 106.) But an apprentice is not bound to remain with his master after cruel and inhuman treatment. (*McBath v. Herndon*, 2 T. B. Mon. 32.)

CHAPTER XXX.

RAISING CROPS ON SHARES.

- § 331. Distinction between leasing land and farming on shares.
- § 332. Parties to cropping contract tenants in common.
- § 333. The cropper on shares not a laborer for hire.
- § 334. Possession of growing crop under husbandry contract.
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- § 336. As to what is "proper husbandry."
- § 337. When "cropping" contract becomes an ordinary tenancy.
- § 338. Agreement to pay with part of crop makes a tenancy.
- § 339. Intention of parties characterizes the contract.
- § 340. Cropping on shares a partnership, when.

§ 331. Distinction between leasing land and farming on shares.—The relation of landlord and tenant is not created by a contract to farm land and raise a crop on shares; the owner of the land parts with no estate therein; the possession remains in him, subject to a qualified right of entry upon it by the other party for the purposes of carrying out his contract; and a naked right of entry upon land, to raise a crop on shares, the owner remaining in the general possession of the farm, does not amount to a lease of the land. So far does this interest of the "cropper" fall short of a right to possession that as soon as the crop is raised and harvested, his right to go upon the premises terminates, except so far as is requisite to remove his share of the crop, and this right of entry ceases with the removal of the crop, and is severable as to different portions of the field; so that, although he has a right to go upon such part of the land as the crop is not harvested or divided and removed from, he is a trespasser if he go upon that portion of the field where the crop has been harvested, divided, and his share removed from.¹

¹ *Creel v. Kirkham*, 47 Ill. 344; *Warner v. Holsington*, 42 Vt. 94; 4 Kent's Com. Sec. 96. "If land be let upon shares for a single crop only, that does not amount to a lease, and the possession remains in the owner." (*Hare v. Celey*, Cro. Eliz. 143.)

State v. Jewell, 34 N. J. L. 259. A contract between the owner of a farm and another person, that the latter shall cultivate such farm on shares, or

§ 332. Parties to cropping contract tenants in common.—The parties become tenants in common of the crop while it is growing; because of the peculiar character of property, the extent of which cannot be determined until the crop is severed from the soil, the ownership of each party appears to be such that, at any time, he may assign his interest in the crop, as he might sell any other chattel, and it may be seized on legal process against him for debt, where growing crops are not exempt from seizure.¹

manage the same for a stipulated salary, and be allowed the use of a dwelling-house, furniture, etc., is not a lease, and such an arrangement does not create the relation of landlord and tenant between the parties thereto.

In *Betom v. Mercier*, 46 Ga., per McCay, J., it was held "that there is an obvious distinction between a cropper and a tenant. One has a possession of the premises exclusive of the landlord, the other has not. The one has a right for a fixed time, the other has only a right to go on the land to plant, work, and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant."

"The defendant entered into a contract with 'A' in writing, not under seal, by which he agreed 'to let' to A a certain farm, to commence on the 1st of April, 1842, and continue from year to year for the term of five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving to the other one month's notice in writing; the produce of the farm to be equally divided by weight or measure between the parties. Held, that although this gave to A an interest in the land, and a right to occupy it without molestation from the defendant, while he continued in the performance of the contract, yet that it did not constitute a lease of the farm, but that A was a *quasi-tenant* at will, while the contract continued in force, and that defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance."

Aiken v. Smith, 21 Vt. 172; *Smith v. Doty*, 1 Vt. 37; *Foote v. Colvin*, 3 Johns. 216; *Bradish v. Schenck*, 8 Johns. 151; *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill, 234; *Walker v. Fitts*, 24 Pick. 193. Judge Swift, also, in his digest, treats the owner of the soil and the occupier under a cropping contract as occupying to each other and the lands a relation differing materially from that of landlord and tenant. (1 Swift's Dig. 91-2; *Hobbs v. Wetherwax*, 38 How. Pr. 385.)

Delaney v. Root, 99 Mass. 546. "By an oral contract between A and B for the cultivation of B's land, each was to furnish one-half of the seed and manure, B to do the team work, and A the hand work and harvesting of the crop, which they were to divide equally. Each furnished his share of material, and did his share of the work, until after the crop began to grow, when B refused to do more work, and forbade A to go again upon the land. A, nevertheless, entered the land again at harvest time, and cut the crop, when B seized and consumed the whole of it against A's will, no division of it having been made, nor any demanded by either of them. Held, that they were tenants in common of the crop, and B was liable in tort for his conversion of A's share of it."

¹ 4 Kent's Com. Sec. 95. "The occupant is, however, a tenant in common with the owner of the growing crop, and he continues so until the tenancy be severed by a division."

There is, therefore, in the farmer on shares, more than a possible or contingent interest in the result of the year's crop; so soon as there is, under the contract, any property whatever, the parties respectively become the owners of it to the extent or portion thereof agreed upon.

The property, or ownership, is, however, peculiar to the circumstances under which it has been created, and does not follow the general rule that the owner may do what he likes with his property, inasmuch as each party is bound to act with reference to the crop, while growing, with reference to the interest of the other, and in subserviency to the contract.

§ 333. The cropper on shares not a laborer for hire.—

The text-books, and many of the decisions, mention the owner of the land as the owner also of the growing crop, and appear to regard him as such, notwithstanding that, in terms, each is called a tenant in common in the crop, to the extent of his interest; and, from the general tenor of standard authorities, it appears to result that the "cropper," or farmer on shares, in many respects resembles a laborer for hire, his remuneration being a portion of the crop, and the amount of his wages dependent upon his own industry and good fortune, and the success of the enterprise.¹ On the other hand, very late decisions treat him not as a laborer for hire precisely, but place him in the category of contractors, with whom the entire control of the labor rests, and not a servant under the orders of a master.²

Aiken v. Smith, 21 Vt. 172; *Guest v. Opdyke*, 2 Vroom, 552. "The occupier, by virtue of an agreement of this kind, becomes simply a tenant in common with the other contracting party of the growing crops, and this joint interest continues until severed by a division." (*State v. Jewell*, 34 N. J. L. 260.)

"Corn growing is a chattel interest, and may be sold by parol." (*Austin v. Lawyer*, 9 Cow. 39; *Killmore v. Howelett*, 48 N. Y. 509.) *Fructus industriales* are chattels, even before severance from the soil. (*Ibid*; *Bryant v. Crosby*, 40 Me. 9; *Sherry v. Picken*, 10 Ind. 375; *Bull v. Griswold*, 19 Ill. 631.)

¹ 4 Kent's Com. 95; *Creel v. Kirkham*, 47 Ill. 344; *Appelling v. Odom*, 46 Ga. 585. "The case of the cropper is rather a mode of paying wages than a tenancy." (*Doe v. Derry*, 9 C. & P. 494; *The King v. Stock*, 2 Taunt. 340.)

² The latest case, to this point, is that of *Barron v. Collins*, (1873) 49 Ga. 531. The action is for damages in enticing away servants; the opinion, by McCay, J., gives this view of the law tersely and with force. "The contract set out is not a contract of service. It does not appear that the labor of Charles Barron's two daughters, and of George Barron, belonged to Charles. As the contract stands, it is a contract of Charles Barron to furnish himself, and three others,

§ 334. Possession of growing crop under husbandry contract.—The parties being tenants in common of the crop while growing, each appears to be in possession of it, upon the principle that the possession of each is that of himself and of his cotenant; how far this common possession of the parties characterizes the right of control in relation to the manner in which the business is to be conducted, how the land is to be cultivated, crops treated, and amount of labor requisite determined, does not appear to have been judicially determined;¹ but from the nature of the agreement, and the relation of the

to crop with plaintiff; he, Charles, not the laborers, to get one-third, and the plaintiff two-thirds, of the crop. This did not make Charles and the hands he furnished the servants of the plaintiff. As the contract is set forth, Charles is a cropper—the control of the labor is with him. It is the ordinary case of a man agreeing, on his part, to furnish the labor, and another the land and stock. The laborers are the servants of Charles, and not of the owner of the land. Charles is a contractor, not a servant."

¹ Some of the older authorities were to the effect that one tenant in common should not maintain trover against his cotenant, unless the other absolutely destroy the chattel held in common, but that doctrine has been long and very sensibly exploded, and the law appears to be settled, that if the chattel be sold or otherwise disposed of by one cotenant, the other may maintain trover. (1 Chit. Pl. 90, 91, 178, 179; *Hyde v. Storer*, 9 Cow. 230-233; *Panninter v. Kelly*, 18 Ala. 718.)

Smyth v. Tankersley, 20 Ala. 212; *Williams v. Nolen*, 34 Ibid. 167. "One tenant in common cannot maintain an action of trover against his cotenant, without proof that the common property has been destroyed, sold, or otherwise disposed of by the defendant." (*Lowe v. Miller*, 3 Gratt. 205.)

In *Appling v. Odom*, 46 Ga. 585, it was decided that, on a cropping contract, the possession of the land was in the owner, as against the cropper; that the latter was a laborer, working for hire, to be paid in part of the crop when it should become matured, and that "the title to the crop, subject to wages, is in the owner of the land." "That, therefore, no person can purchase or take a lien on the cropper, to wit, his share of the crop, until the bargain be completed, to wit, until the advances of the planter to the cropper, for the supplies, have been paid for. A different rule might obtain as to a tenant, the right of the landlord for supplies being only a lien. But the cropper's share of the crop is not his until he has complied with his bargain."

But the converse of this proposition was held in *Aiken v. Smith*, 21 Vt. 172, in which the cropper's interest in the crop, and his right to dispose of it, was elaborately discussed, and the ruling was that the cropper's interest was as definable as that of any other person in a growing crop; that at all times he was, with the owner, a tenant in common in it, and in no sense a laborer for hire who was to be paid a share of the crop, and that, therefore, he could sell his interest at any time to a third party, who would then become substituted in his place, and become a tenant in common with the owner of the soil; and this proposition appears to be conceded by the great mass of cases. (*Lowe v. Miller*, 3 Gratt. 206-208; *Ferrall v. Kent*, 4 Gill. 209.)

Bernal v. Hovious, 17 Cal. 542, in which a doctrine diametrically opposite to that of *Brazier v. Ansley*, 11 Ired. 14, is laid down, viz: That the cropper's inter-

parties to the subject-matter, it appears to result that, while neither party may exercise his ownership to the injury of the other, or to the detriment of the growing crop, the possession is practically, for the legitimate purposes of the farming operations, in the cropper, and he must exercise over the growing crop such control as is incident to its care and culture; he is bound to the exercise of requisite labor, care, and skill to bring the crop to maturity; and to do so, the possession of it while growing must be in him.

§ 335. The cropper must farm in a husbandlike manner.—The general principle controlling all contracts is applicable: work under a contract which omits to specify the manner of its being done, is, by implication of law, to be done in a workmanlike manner; and where, as may often occur in this class of agreements, no specific mode of culture or of division of the crops is designated, the law will supply the defect, and, by implication, establish a covenant on the part of the cropper to do the work and treat the land in a workmanlike manner.¹

§ 336. As to what is proper husbandry may, of course, like any other covenant, appear in the contract, but in the absence of such provision, local usage and custom in the vicinity will control.¹

The prevailing theory in such matters is that parties, in the use of language in making contracts, give to it such signifi-

est in a growing crop can not only be sold by him, but also may be sold by the sheriff on execution against him, and the purchaser will become tenant in common with the owner of the land.

¹ *Smith v. Nelson*, 33 Iowa, 24. "Where a contract fails to specify the manner in which the work is to be done, it will be held, as a matter of law, that it was to be done in a workmanlike manner."

¹ *Clemm v. Martin*, 34 Ind. 341. "A stipulation in a lease for farming that the crop, when harvested, shall be divided according to the custom prevailing among the farmers in the neighborhood in which the land is situated, is valid."

Scruggs v. Gibson, 40 Ga. 511, in which it was held that where there was an agreement made to cultivate A's land by B, and raise a crop on it, but nothing was said about rent or price to be paid for use of the land, and it was proven that there was a custom in the neighborhood to rent land for one-third of the crop, it was held that there was an implied agreement to conform to this custom, and that the parties would be deemed to have made the usual cropping contract, and a distress proceeding was authorized to give the owner of the land his share of the crop.

cance as it generally has in the vicinity, and is by common custom given to it by persons in the neighborhood under similar circumstances. Technical terms, words, and phrases may convey to the mind different impressions, and may have, in effect, different meanings in different places.

The whole theory of contract is based on the idea of the minds of the parties having met and agreed; to show what they agreed upon may not always be done by reducing the language of their contract to any precise, abstract standard of definition, but the true way is to give to their language such significance as the parties intended, and no way more just to ascertain their understanding has been found, than to apply local rules of construction established at the place by persons engaged in making similar arrangements. The same rule of construction applies to contracts or covenants which legal presumptions establish; the law only makes use of language for the parties, by assuming that they made covenants which they ought to have made.

§ 337. When cropping contract becomes an ordinary tenancy.—The relation of landlord and tenant is created when the contract is that the cropper shall have the exclusive possession and pay for it by a portion of the crop; the distinction is a nice one, and upon it depends the relation of the parties each to the other, and to the subject-matter.¹

The distinction must, however, not be lost sight of, between possession of the growing crop for the purposes of cultivating the land, caring for the crop, and the performance of such labor as the contract calls for, an absolute, uncontrolled possession of the land for the purpose of raising the crop.

¹ 4 Kent's Com. 95-6. "But if the contract be that the lessee possess the land with the usual privileges of exclusive enjoyment, it is the creation of a tenancy for a year, though the land be taken to cultivate on shares." (*Jackson v. Brownell*, 1 Johns. 267; 1 Bell's Comm. 75-7; *Hart v. Hatch*, 40 N. H. 97.)

The permission to go upon the land to raise a crop is more of a license than a lease; "it is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the Statute of Frauds." (3 Kent's Com. 432-3; *Alwood v. Ruckman*, 21 Ill. 202.) "When the facts are doubtful as to whether the possession and control are absolute and exclusive in the tenant, or jointly in the owner of the land and the cultivator of the crop, and whether the right of entry continues for the year, or only till the crop is removed; the inclination will be, and should always be, in favor of the latter conclusion."

The possession of a tenant in common is the possession of his cotenant, and, so long as the contract is that of raising the crop on shares, the parties are tenants in common of the crop; hence, in the possession of the cropper there is nothing exclusive, and his possession is that of his cotenant, the owner of the land.

An important covenant of a lease is that the tenant shall have the quiet, peaceable, and uninterrupted possession of the demised premises; it is the manifest intention of the parties that the landlord shall be excluded, and the tenant may have his action against him if he interferes with the possession during the term of the lease; and the existence of a tenancy in common, whereby each has the right of entry and possession, would destroy the covenant for exclusive possession by the tenant.

The law is too well settled to admit of dispute, or to require authorities for its support, that where one lets to another a piece of land for the simple purpose of raising a single crop upon it, of which the owner of the land is to have a part, and the one who cultivates it is to have a part to pay him for the cultivation, that in that case the relation of landlord and tenant need not necessarily exist, but that the parties may be tenants in common in the crop which is raised.¹

§ 338. Agreement to pay rent with part of crop makes a tenancy.—The letting of land for a part of the crop, to be delivered at harvest time, is not a cropping contract. In this case a contract is made for the use of the land for the term, which may be determined in the agreement by specifying the length of its duration, or by limiting it to such time as may be required to plant, raise, and harvest the crop; the term is either definite, or by the agreement may be made so by the circumstances and occurrences indicated; the rent, instead of money, is to be paid in part of the produce, and is none the less rent because the precise amount is not determined at the time when the lease is made. Such a contract is a lease; the owner of the

¹ *Hare v. Caley*, Cro. Eliz. 143; *Foot v. Colvin*, 3 Johns. 216; *Bradesh v. Schenck*, 8 Ibid. 117; *DeMott v. Hagarman*, 8 Cow. 220; *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill, 234; *Bishop v. Doty*, 1 Vt. 37; *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Pick. 191; *Maverick v. Lewis et al.* 3 McCall, 211; *Bernal v. Hovious*, 17 Cal. 544.

land has no right of possession and no ownership of the crop until it is harvested and delivered to him, and the law is well settled that there may be a leasing of land from year to year, or for a single year, where the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop, in which case the parties are not tenants in common of the crop raised, but the title to the whole is in the tenant until the rent stipulated is paid.¹

§ 339. The intention of the parties characterizes the contract.—Whether the parties are landlord and tenant, or tenants in common, under cropping contract, as in other contracts, depends on the intention of the parties; and this intention must, in most cases, be inferred from the circumstances which attend the case. In general, the question of possession will determine the matter. Where the tenant moves on to the farm, and, with the consent or acquiescence of the owner, occupies and controls it exclusively, as if it were his for the time being, and is, by the agreement, so to occupy it for the year, it would be deemed to be in his exclusive possession; and the contract would amount to a lease of the premises, although the rent was to be paid in a part of the crops, the amount of which was to be determined by the amount of the crop raised.²

¹ *Dulaney v. Dickerson*, 12 Ala. 601; *Wells v. Preston*, 25 Cal. 59. "An agreement in writing between two parties, by which the party of the first part demises and leases to the party of the second part land, (describing the same) for a term specified; and the party of the second part agrees to cultivate and plant the land at his own expense, and deliver on the premises, to the party of the first part, one-sixth of all the crops raised as soon as harvested, and not to underlet the premises or yield the possession to any person other than the lessor, without the lessor's consent in writing, is a lease, and not a contract for the services of the party of the second part, for which he is to receive as compensation a portion of the crops he may produce."

"If the agreement contain terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of the division of the crops." (*Ibid*, 64.)

So in *Brozier v. Ansley*, 11 Ired. 14, it was held that it was, in that State, (N. C.) a well settled law that "a cropper has no such interest in the crop as can be subjected to the payment of his debts, while it remains *en masse*; until a division is made, the whole is the property of the landlord." Citing *State v. Jones*, 2 Dev. & Bat. 544; *Hare v. Pearson*, 4 Ired. 77, which sustain the proposition, but only incidentally, and not with direct effect to the point.

² *Taylor's Landlord and Tenant*, Sec. 24; *Tuttle v. Bebee*, 8 Johns. 152; *Bailey v. Fillebrown*, 9 Me. 12; *Butterfield v. Baker*, 5 Pick. 552.

In such a contract, the tenant would be held to be the exclusive owner of the crop while it was growing, and even after it was harvested, until the share appropriated to the payment of rent was set apart and paid over or delivered to the landlord.¹

On the other hand, where the owner of the land resides upon it, and continues to exercise control over it as the owner, and allows another to cultivate a crop upon a part, or even the whole of it, and is to receive a part of the crop as his compensation for the use of the land, there is no such right of possession of the land as makes the cropper the tenant, or entitles him to any right of entry upon the land other than so far as is necessary for the growing, harvesting of the crop, and removing his portion thereof; and, in such cases, the parties are tenants in common as to the crop.²

§ 340. Cropping on shares a partnership, when.—Under a cropping contract, the proceeds of the farm become, to a limited extent, a partnership fund, out of which the one who works the place is to be paid for his labor and for what he has done and furnished toward the production of the crop, and out of which the owner of the farm is to receive pay for the use of his land, and for what manure, seed, or other thing which he has provided.

This joint property, so far as the ownership and division of it goes, is subject to the general rules affecting partnership assets; and the joint accounts between the parties, growing out of the

¹ *Smyth v. Tankersley*, 20 Ala. 216. "If the tenant take an interest in the land, it is a lease, by whatever words made; and the payment of a specific portion of the crop is then simply a payment of the rent in kind."

Symonds v. Hall, 37 Me. 354. "The lessee of a farm, who stipulates that one-half the hay shall be consumed on the farm, and the other half divided between the lessor and lessee, until a division is made," has the *entire* property in the hay until *division* be made. (*Dockham v. Parker*, 9 Me. 137; *Wells v. Preston*, 25 Cal. 62-4; *Garland v. Hilburn*, 23 Me. 442.)

² 4 Kent's Com. 95-6; *Taylor's Landlord and Ten. Sec. 24*; *Bernal v. Hovious*, 17 Cal. 544; *Warner v. Hoisington*, 42 Vt. 94; *Yale v. Seeley*, 15 Vt. 221; *Hubbell v. Wheeler*, 2 Aiken, 359; *Williams v. Nolen*, 34 Ala. 167.

Walls v. Preston, 25 Cal. 65. "The object of Courts, in adopting rules of construction, is only to furnish means to so interpret the agreement as to ascertain the intention of the parties. The object is not to make a contract for the parties, nor to vary the terms of the covenants they have entered into; nor is it arbitrarily to insert a covenant they have not agreed to."

contract, are to be settled as partnership accounts are settled, and the property treated as partnership property is treated.

It is an established principle that nothing can be considered as the exclusive right of one partner but his proportion of the funds, upon a balance being struck between all the partners; in other words, one partner has no exclusive right to the partnership funds until his copartner is paid all the demands he has in that character on the partnership.¹

To this general rule should be submitted questions affecting the rights of the parties, under a cropping contract, to the crop produced while they occupy the relation to the property and each other provided for thereby. But, of course, as soon as the division is made, all partnership relation ceases. But it does not follow that, to all intents, the parties to a cropping contract are partners. The inclination of the Courts is against construing these agricultural contracts as partnerships to the full extent of authorizing the parties to bind each other. In that important particular, as in many others, these contracts fall short of being partnership agreements; but, as joint owners of the crop, they become subject to the same rules as partners, in respect to the joint property.²

¹ *Canfield v. Hard*, 6 Conn. 184; *Taylor v. Bradley*, 39 N. Y. 129; *Summers v. Joyce*, 40 Conn. 592.

² "A and B entered into a contract, by which A leased, demised, and, to farm, let to B a farm for three years, and B agreed to furnish all the labor necessary for its cultivation; each party to furnish half of all the necessary stock and tools, and two tons of plaster, annually; the net proceeds, income, and increase of the farm to be annually divided equally between them. Held, that the contract was neither strictly a lease, nor a hiring of labor, but was of a mixed nature, and that the products of the farm were the joint property of the parties." (*Somers v. Joyce*, 40 Conn. 592.)

"And held, that the joint accounts between the parties were to be settled, and the property treated like partnership property." (*Ibid.*)

CHAPTER XXXI.

DAIRY CONTRACTS.

- § 341. Peculiar characteristics of dairy contracts.
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- § 349. Right to "increase" from cows under dairy contract.
- § 350. Duty of tenant under dairy contract.
- § 351. For loss by theft, hirer of animals not responsible.
- § 352. Cattle must be kept on the land designated.

§ 341. Peculiar characteristics of dairy contracts.—

The ordinary dairy contract, in which the owner of the cows, and of the land on which they are to be pastured, lets the property, real and personal, to the other party, to dairy on shares, presents peculiar features, which are so characteristic, that to regard them in the ordinary view of husbandry, or "cropping" contracts, is not wholly safe. The covenants of a cropping contract are measurably reducible to principles affecting the title and possession of realty, while dairy contracts relate primarily to personal property, the cows, and the produce from their milk, with the use of the pasture land as an incident to, rather than the controlling feature of, the arrangement.

§ 342. The owner may retain partial control of property.—The owner of cattle, under dairy contract, retains certain control over his animals as to pasturage, so as to guard against overstocking the land and starving the stock.

The contract cannot be treated like an ordinary bailment, or letting for hire, of personal property. It is not as though the bailee hired the cows to take upon his own premises, or remove them from the land of the lettor. He has no such right, and, moreover, that is precisely what the owner of the stock desires

to prevent. He purposes having them kept on his own premises, and measurably under his own control, in that he may see how they are used; and by lease of the cows, with enough use of his land for their pasture, he insures against their being run down by the land being overstocked. In this important particular, the lettor retains the control, and guards against such injury as naturally might result from a mere hirer of cows for dairying purposes yielding to the temptation of putting on his land the utmost number which could be kept on it through the milking season, when the grass was green and abundant, while, so soon as the pasture became dry and scant, the animals might suffer and be injured.

§ 343. The owner may retain requisite control to guard his interest.—The owner of cows under dairy contract retains such control of his animals as to insure proper breeding.

In the important matter of providing for the cows continuing to be of value for dairy purposes after the expiration of the lease, the owner has an interest in which the hirer does not join. The purposes of dairying through the season for which the animals are hired do not demand any attention from the hirer, so far as his interest extends, while it is of the utmost importance to the owner of the animals that his cows be duly “served,” in order that they may “come in” the following year. Hence, the provision is natural and customary to be inserted into dairying leases, covenants making due provision in this behalf for the grazing with the cows, and properly caring for such bulls as may be requisite for the purposes indicated, and to that extent the owner of the herd and the land may retain control, notwithstanding the lease.

§ 344. The owner may dictate as to breeding cows.—The lettor of animals and land on a dairy contract may designate the breed of bulls to be run with his cows. The peculiarity of the contract of letting cows on a dairy contract extends to such guarding of the future interests of the owner, in which the hirer has no part, that a covenant as to the breed of bulls to be run with the cows has been deemed a proper one, and is not unusual.

An important consideration to the owner, in dairying his cows, often is the improvement to his herd by raising the grade of it by "breeding up," and this consideration may well induce him to let out his land and animals on a dairy contract, or become a partial inducement thereto. The hirer, even where for a term of years he may in his own interest be compelled to keep bulls with the herd, has no personal interest in the grade or "breed" of such animals, and he would naturally be inclined to keep low-grade or cheap animals; but where, by contract, the owner stipulates in his interest for certain character of breeding, the covenant may be enforced.

§ 345. Covenant to raise calves.—The lettor, under dairy contract, may stipulate for rearing progeny of cows leased for him by the hirer.

Whatever tends to induce either party to a contract to enter into the agreement, when the other party is informed of such inducement, and assents to it, becomes a part of the consideration on which the contract stands. A price specified is not necessarily the entire consideration of an agreement. From the word itself, it appears that the minds of the parties must meet; there must be an "agreement," and the use of the written contract is but clearly to show what it was to which the parties agreed. Hence, no one part of the instrument is alone to be regarded. It must be regarded as an entirety; and, because a price to be paid is specified as rental, that cannot be deemed the entire consideration. When the contract contains a further covenant, like that to raise a certain number of calves for the lettor, by the hirer, both money and calves must be deemed to have been the consideration which induced the action on the part of the lettor. But this further consideration must be mentioned in the written lease, if there is one, because of the general rule that where a contract is reduced to writing, that must control and be the proof as to what it was which was agreed to. Stipulations, promises, considerations, all which was said at or before the time when the contract was reduced to writing and executed, is deemed to have been merged in and completed by the written instrument, which can only be

attacked on such grounds as fraud or mistake, and such attack must be by direct action, brought for that purpose.

§ 346. Lease of real and personal property by same contract.—In leases for dairy purposes, it sometimes occurs that all the property—cows, dairy utensils, wagons, and other personal property—is rented, with the use of the land for pasture, at a money rental, entire; and it not unfrequently occurs that a price for the term, per cow, is the measure of the entire rental. How any action for recovery of possession of the land, in case the rent remains unpaid when due, can be maintained, is not clearly apparent; certainly it will be difficult, in such cases, to enforce the provisions for summary ejectment of the tenant, provided by the laws against tenants holding over, which ordinarily form a part of the statutes of the several States, known as the Forcible Entry and Unlawful Detainer Acts.¹

¹ *Cary v. Welch*, Supreme Court of California, July Term, 1874. In this case, these questions arose: a lease was made by plaintiff to defendant "of the following described property, viz., one hundred cows, one wagon, and all the usual and necessary dairy fixtures and utensils to carry on said dairy of one hundred cows, together with sufficient use of the following described land, [describing it] to feed said cattle, and carry on said dairy. To have and hold for the term of three years, to wit, from the first day of October, 1872, to the first day of October, 1875; yielding and paying therefor the rent of \$2,700 per year, or the sum of \$8,100 for said term of three years." The lease also contained the usual covenants, on the part of the tenant, to pay the rent, and, in default thereof, to yield possession. An installment of rent fell due; defendant did not pay it; demand was duly made, and, under the Forcible Entry and Unlawful Detainer Act, suit was commenced to eject the tenant from the land.

Defendant, in due form, demurred to the complaint; and the objection was raised, and at every stage of the trial insisted upon, that such an action could not be maintained.

The Court below overruled these objections, upon the ground that the realty was leased, that the lease contained the usual covenant of forfeiture for non-payment of rent, and, upon due demand, there having been a refusal on the part of the tenant to respond at all to the demand for rent, it must result that there had occurred such a forfeiture as the lease provided for.

From the judgment of the Court below an appeal was taken to the Supreme Court, where the propositions involved were fully argued and considered by the Court.

The first proposition involved was that the action of *forcible entry and unlawful detainer* is for *real property only*. (Taylor's Landlord and Tenant, Sec. 786.)

Second. There is no means of determining the precise amount of rent which was due for the use of the land. To work a forfeiture, there must be some definite sum due and unpaid, and it is not enough that some rent must be payable;

§ 347. Landlord's loss of rent by interference with property.—Interference by the landlord with any of the personal property leased might endanger right to rent of realty. The peculiar danger of leasing personal and real property under one contract becomes apparent from another point of view. It might become questionable whether, under any form of action, the contract for payment of rent could be enforced. If the forfeiture of the lease occur through non-payment of rent, the forfeiture, to be effective, must be entire. There could be no forfeiture

from the necessities of such cases, the amount must be determined or determinable. (Taylor's Landlord and Tenant, Sec. 786; Doe v. Wandlass, 7 T. R. 117; Co. Litt. 202a; Jackson v. Kipp, 3 Wend. 230.)

Third. Before the landlord could enter for the non-payment of rent, he must have made a formal demand for the *precise sum due*. (Taylor's Landlord and Tenant, Sec. 493; Doe v. Paul, 3 C. & P. 613; Van Renselaer v. Jewett, 2 N. Y. 147; O'Connor v. Kelly, 41 Cal. 432.)

Each of these propositions was sustained, and, judgment being reversed, the cause was remanded, with directions to the Court below to dismiss the action.

The chief objections to this form of action in the premises appear also applicable to ejectment, and, had the landlord resorted to that, he might still have encountered the same difficulties. To constitute a forfeiture for non-payment of rent, at common law, it was requisite, among other things, that the demand should have been for the *precise sum due*. (1 Saunder's Rep. 287, Note 16; 1 Leon, 305; Fabian & Windsor's Case, Cro. Eliz. 209; Taylor's Landlord and Tenant, Sec. 493.) And the statutes of the various States, although relaxing the rigor of the ancient rule as to place, time, and manner of making the demand, do not, in terms or by implication, relieve the landlord from formal demand of the *precise sum due*.

It is true that the statutes of some of the States have substituted the service of a declaration in ejectment for a formal demand of rent, but an analysis of these statutes shows that the complaint itself must be a demand for the *precise sum due*, and the difficulty does not seem to be obviated. (2 R. S. N. Y. 505, Sec. 30; 4 Geo. II, Chap. 28.) In O'Connor v. Kelly, 41 Cal. 434, in ejectment, the failure to demand the *precise amount due as rent* was held to be fatal to plaintiff's hopes of recovery. So, also, in Gage v. Bates, 40 Cal. 385; Gaskill v. Trainer, 3 Cal. 334.

From the nature of things, a tenant being rightfully in possession, a forfeiture can only be established in absolute antagonism to him; no waiver of the demand will ever be implied; the mere failure to pay rent will not make a forfeiture; the formal demand for the *precise sum due* must be shown affirmatively. (Gaskill v. Trainer, 3 Cal. 340.)

It certainly would be a great hardship upon the tenant if a landlord were permitted to destroy the leasehold estate by making a demand generally for rent due, without specifying the particular sum claimed, and thus force the tenant to forfeit all rights under a valuable lease because he may not, by reason of unsettled accounts or otherwise, have paid all the rent which may ultimately be shown to have been due.

But, on the other hand, the danger to the landlord, of these compound leases of real and personal property, becomes apparent where the tenant is impecunious, and the rent is to be made from the dairy product of the cows grazed upon the land.

if the landlord evicted the lessee from any portion of the demised premises;¹ nor, if the tenant retained the occupation of the residue, could the lessor hold him for the proportionate rent thereof.²

If a landlord lease premises with a water-course on them, and afterward stop the water-course, the tenant may consider it an eviction; so, if he set up a gate across a lane, or obstruct the lights to a house, or deprive the tenant of the special privilege of using a pump on adjoining property.³

And where a lease is of personal property, with the use of the realty as pasturage, it might well be an eviction on the part of the landlord to deprive the tenant of the use of the cows; and he might deprive himself of the right to retake his cows, if he find that the tenant is abusing them, or to protect himself in any way which would interfere with the possession of any part of the personal property. Any such interference would be at a risk of causing an eviction such as might work a forfeiture, and endanger the collection of any rent.⁴

¹ *Taylor's Landlord and Tenant*, 315. "It is also implied that the tenant shall have the free use of the whole of the premises; and if he is ousted from any material part thereof, he may treat it as an eviction from the whole premises." (*Etherige v. Osborn*, 12 Wend. 529; *Hay v. Cumberland*, 25 Barb. 594.)

² *Leishman v. White*, 1 Allen, 499; *Christopher v. Austin*, 11 N. Y. 216; *Taylor's Landlord and Tenant*, 379.

³ *Rhodes v. Bullard*, 7 East, 116; *Salman v. Bradshaw*, Cro. Jac. 304; *Andrews v. Paradise*, 8 Mod. 318; *Morris v. Edginton*, 3 Taunt. 24; *Kidder v. West*, 3 Lev. 167.

⁴ *Taylor's Landlord and Tenant*, 379. "Upon the principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, if he has been evicted from the other part by his landlord, it has been held that, if a landlord, without the consent of his tenant, uses privileges which are appurtenant to the premises, and which are not expressly reserved in the lease, he is not entitled to collect rent."

Skaggs v. Emerson, Supreme Court of California, 50 Cal. 3. "Upon the forfeiture the plaintiff must rest as his ground for any judgment, and he claims that the forfeiture arose from non-payment of rent. But if the averments of the answer, which were stricken out by the Court below, are true, no recovery can be had upon the covenant to pay rent, since defendant had been evicted by plaintiff from a substantial part of the demised premises. The covenant to pay rent is entire, and cannot be severed or apportioned."

Camarillo v. Fenlon, 49 Cal. 203; *Briggs v. Hall*, 4 Leigh, 484; *Christopher v. Austin*, 11 N. Y. 216; *Shumway v. Collins*, 6 Gray, 227; *Neale v. Mackenzie*, 1 Mees. & W. 747; *Blair v. Caxton*, 18 N. Y. 529.

But see *Edgerton v. Page*, 20 N. Y. 281; *Academy of Music v. Hackett*, 2 Hilt. 217; and *Mortimer v. Brunner*, 6 Bosw. 653. A mere trespass by the landlord, as where he piled firewood on part of the leased land, and which did not inter-

§ 348. Possession, under dairy contract, of real and personal property.—As to the right of possession of the property during the term of the leasing or dairy contract, it may be conceded that the personal property is certainly in the possession of the lessee, or party to the contract, who is to use the animals for dairying purposes.

This is almost necessarily the case, because the owner cannot, from the nature of the case, retain any possession of the cows and other personal property devoted to a particular purpose to which it is to be applied by another. From the very fact of such devotion, the party who is to put it into effect must have possession, except so far as may be affected by special reservation, as, for instance, the wagon and horses may, by special agreement, only be used for marketing the dairy produce by the tenant, while the general possession and use is reserved by the owner. Such instances of reservation, however, only make it more apparent that the possession of the chief personal property to be used in the business must be in the tenant.

As to the land, it is not so clear. The general possession may remain in the owner, subject to so much use thereof as is requisite for the purposes of the contract, or there may be a sort of common possession in both parties to the contract, and, in such a case, it would appear that either could maintain trespass against an intruder who interfered with the enjoyment of the premises to which either party was entitled.¹

fere with the substantial enjoyment of the premises, does not amount to an eviction. (*Lansberry v. Snyder*, 31 N. Y. 514.)

¹ *Cornell v. Dean*, 105 Mass. 435. In this case, it was held that one who has hired a farm on shares may maintain an action against a third party, whose cattle he has agreed to pasture thereon, without joining his lessors.

Herskell v. Bushnell, 37 Conn. 36. "A let his farm to B on shares, the stock being owned in common, each furnishing half the seed, and receiving half the crops, and both living in the house on the farm. Held, that the occupation of B as tenant did not exclude the occupation of A, and that A, under the statute, could seize and take into custody cattle trespassing upon the farm; and held, that he was not bound to act jointly with B in seizing the cattle."

The parties have a common interest in the premises, and each is damaged by the trespass—the entry of the cattle inflicted a common injury to both parties.

"It would be absurd to require both tenants in common in the growing crop to participate in taking into custody the trespassing animals."

Each has an immediate interest to protect, and incidentally he protects his cotenant, and the cotenant can have no ground of complaint if he is not asked to join in protecting the common interest; and a stranger who has injured both cannot well complain that both do not sue him. (*Ibid*, p. 46.)

§ 349. Right to increase from cows under dairy contract.—The increase from animals, while leased out for dairy-ing or similar purposes, as a general rule, belongs to the tenant, for, according to the general principle of law, such increase belongs to the person who, by hiring for a time, becomes the temporary proprietor of the animal.

The rule may be taken to be that where animals are let for hire their increase belongs to the person who hires them, unless it be otherwise agreed at the time the contract is made. Where, however, the animal is only loaned without any remuneration for the use of it, this rule does not apply, and the owner of the dam is entitled to, and upon its birth becomes the owner of, her progeny.¹

But for injury to property, or for conversion of it, a party can only recover who has actual or constructive possession of it; and if the owner has, for the time being, parted entirely with the possession of the animals leased, the tenant alone should sue for damage to them, especially if he has covenanted, as is usual, to return them in good order and condition. (*Putnam v. Wiley*, 8 Johns. 434; *Orser v. Storms*, 9 Cow. 687; *Bac. Abr. [C.] 2.*)

¹ *Moore v. Mohney*, 1 Mich. Nisi Prius, 143. "A let a farm to B, and by the contract was, amongst other things, to furnish B a team to work in carrying on the farm, and was also to furnish B two or more cows to be kept by B, and B was to deliver to A one-half of all the butter made from said cows. Held, that B was entitled to the increase of the cows during the term."

In this case, the plaintiff leased her farm to defendant for two-thirds of the hay, grain, and other produce to be raised; plaintiff to furnish seed, feed, teams, and tools, and in the contract occurs this agreement: "The said party of the first part, (plaintiff) further agrees to furnish to the said party of the second part, (defendant) two or more cows, which are to be kept by the party of the second part, and the party of the second part further agrees to deliver, to the party of the first part, one-half of all butter made from said cows." Defendant, under this agreement, took possession of the premises and personal property, and remained so in possession, by mutual consent, from year to year, for three years, and then gave up possession to plaintiff, but retained the progeny born from the cows while so in his possession. Plaintiff replevied them, under the plea that, owning the mothers, she also owned the increase, but her claim was not sustained,

The Court says, p. 144: "The written contract being silent on the subject of the increase of the cows during the term, the legal right must be determined by the relation the parties sustain to each other in respect to the cows during that time. The contract seems to make the defendant a bailee of the cows for hire. They were let to him as a part of the condition of the lease of the farm, and he was also bound to deliver to the plaintiff, in consideration therefor, one-half of all the butter made from the cows." "Where animals are let for hire, their increase belongs to the person who hires them, unless it be otherwise agreed upon by the parties when the contract is made. Under this rule, therefore, the defendant is entitled to the increase of the cows."

Orser v. Storms, 9 Cow. 687; *Concklin v. Havens*, 12 Johns. 314.

But this rule by no means precludes the making of a special contract, by which the tenant, or the party who receives the animals on a dairying contract, bind himself to deliver to the owner of the animals such of the young born of them as may be stipulated; nor does it militate against a reservation on the part of the owner, by which he retains the ownership of the progeny.¹

§ 350. Duty of tenant under dairy contract.—The hirer of animals on a dairy contract is responsible for their safe-keeping. The general obligation of the taker of animals, on a dairy contract or lease, is substantially the same as that of an ordinary hirer of chattels; he is bound to take such care of the animals as the circumstances of the case may demand, the measure thereof being that he should provide food and shelter for the animals, such as the necessities of the case require, and treat them kindly. The bailment is for a special purpose, and with reference to the animals being returned in such condition as the parties contemplated, with reference to their future usefulness; and, like other hirers of personal property, the bailee is bound to such diligence and care of the animals intrusted to him as an ordinarily prudent man would naturally bestow upon his own property of a similar character.

§ 351. For loss by theft, the hirer is not responsible.—In cases of robbery the hirer is not responsible, unless the theft occurs through his negligence in failing to take due precautions against a recognized danger. Robbery is generally regarded as an accident by superior force (*vis major*). But if the bailee is aware that the vicinity is infested by cattle-thieves, and that there is especial danger of theft to be apprehended, he must take all due precautions within his power to place and

¹ Putnam v. Wiley, 8 Johns. 432. "A person cannot maintain trespass for goods unless he has the actual or constructive possession of them at the time. He must have, at least, such a right as to be entitled to reduce the property to his possession when he pleases.

"Where A delivered to B a number of cows and sheep, which B promised to re-deliver within one year, with their increase, and to pay for such as should be lost or destroyed, and not redelivered, this was held a letting of the chattels for a year, for a valuable consideration, and not a naked bailment, and that A could not maintain trespass against a person who took them from the possession of B."

keep the animals under such guard as, under the circumstances, an ordinarily prudent person would with cattle which belonged to him.¹

§ 352. Cattle must be kept on the leased land.—The hirer of animals on a dairy contract cannot remove them from the premises of lessor, where they are leased to him in the ordinary manner, to be kept on the premises of the owner. He comes within the principle of the rule of those who hire property for a certain, specified use. There is no general property accorded in the property for the term, but only a special, limited one, for the precise purposes of the bailment; and just so far as that is exceeded, the hirer becomes a wrong-doer by taking to himself that which has not been yielded by the owner, in whom lies the general property, or ownership; and he may be treated by such owner as having taken the animals to his own use, and be by him held as a purchaser of them at their full value, whenever he acts toward them in a manner inconsistent with, or in excess of, the special purpose of the letting.

The general rule of hiring applies, that if the thing let is used for a different purpose from that which was intended by the parties, or in a different manner, the hirer is not only responsible for all damages, but if a loss afterward occurs, although by inevitable casualty, he will generally be responsible therefor.² In short, such misuser is deemed, at common law, a conversion of the property, for which the hirer is held responsible to the lettor, to the full extent of his loss.³ And if the bailee make a sale, or other disposition of the property, antag-

¹ Story on Bailments, 25-27. "Bailees in general are not responsible for losses resulting from inevitable accident, or from irresistible force." "Robbery by force is deemed irresistible." "But the loss by a mere private or secret theft is not deemed to be irresistible; and whether it excuses the party or not, depends upon the nature of the bailment, and the particular circumstances of the case. If the proper degree of diligence has been used by the bailee, and, notwithstanding that, a loss by such theft ensues, he is not responsible." (*Clarke v. Earnshaw*, 1 Gow. N. P. Rep. 30.)

² *Robinson v. Varnell*, 16 Texas, 382; *Sims v. Chance*, 7 Ibid, 561; *Miller v. Asche*, 16 Tex. 285; *Trotter v. McCall*, 26 Miss. 413.

³ *Jones on Bailments*, 68, 69, 121; 2 Lord Raym. 909, 917; *Mayor v. Howard*, 6 Ga. 219; *Hook v. Smith*, 18 Ala. 338; *Isaac v. Clarke*, 2 Bulst. R. 306, 309; *Wilkinson v. King*; 2 Camp. 335; *Loeschman v. Machim*, 2 Stark. 311; *Youl v. Harbottle*, Peake R. 49.

onistic to the purposes of the letting, the bailment would be ended, and a suit could be maintained against him by the bailor for a tortious conversion thereof, or against the purchaser, if he refuse to return the property on demand.¹

¹ *Sargent v. Gill*, 8 N. H. 325; *Lovejoy v. Jones*, 10 Foster, 165; *Sanborn v. Coleman*, 6 N. H. 14; *Bailey v. Colby*, 34 N. H. 29.

Part V.

REAL ESTATE.

CHAPTER XXXII.

GENERAL PRINCIPLES OF THE LAW AS TO REAL PROPERTY.

- § 353. The law of real property.
- § 354. Real property is corporeal or incorporeal.
- § 355. A fee-simple.
- § 356. Estates tail.
- § 357. An estate for life.
- § 358. An estate by curtesy.
- § 359. Dower.
- § 360. Estate for years.
- § 361. An estate at will.
- § 362. Joint tenancy.
- § 363. Tenancy in common.

§ 353. The law of real property cannot, within the space to which a consideration of it is allotted in this work, be regarded so fully as is to be desired, and but little can here be done more than to glance at the leading characteristics of the law, and, by references, point to such authorities as treat upon the subject, and cover the ground which we can but enter upon. The first great division of property into real and personal, now so familiar, seems not to have prevailed until the power of the lords over the soil and the common populace was weakened by the breaking up of the feudal system in England. As the power of the commons increased, and the legal rights of the subject, as contradistinguished from such privileges as might be accorded him by his lord, were recognized and protected by the power of the law, the peculiar remedies sought for grievances created this distinction. Thus, where one had been unjustly deprived of his lands, the remedy which he sought was to recover the possession of the land itself—the *real property* which he had lost; but where a chattel, goods, or money had been taken from him, his remedy was against the *person* who had deprived him of it, or converted it to his own use.¹

¹ 2 Blackst. Com. 1-10; Kaimes' 3d Hist. Tract; Maine, Anc. L. Chap. 8. "Of all subjects of property," says Lord Kaimes, "land is that which engages our af-

This distinction has been maintained with constantly increasing rigor, as the requirements of advancing civilization and refinement have made necessary; but, though the line of distinction between these two classes of property may, in general, be easily drawn, cases will appear in which property will be real or personal according to the circumstances which affect it.¹

§ 354. Real property is corporeal or incorporeal.—Corporeal property consists wholly of substantial and permanent subjects, all which may be comprehended under the general denomination of land, which, in its legal signification, comprehends the soil or earth, and an indefinite extent upwards and downwards, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it, or beneath the surface, such as minerals or the like.²

Incorporeal property, or hereditaments, consist of rights and profits arising from or annexed to land, which are held to be of a real nature, or such as are said, in the older law terms, to savor of the realty.

The incorporeal hereditaments which subsist by our law are

fections the most, and, for this reason, the relation of property respecting land grew up much sooner to its present firmness and stability than the relation of property respecting movables." (Tracts, p. 96; *Commonwealth v. Tewkesbury*, 11 Metc. 55; *Commonwealth v. Alger*, 7 Cush. 53, 86; *Cushman v. Smith*, 34 Me. 258; 1 Washburn on Real Property, 2.)

¹ 1 Washburn on Real Property, 2. "Thus, a house or a standing tree may acquire the incidents of personal estate, while articles of a movable character may come to have qualities which belong to the realty, by the nature of the use to which they are fitted and applied." "There is a division of things which excludes the idea of separate, individual property, such as air, running water, the sea, sea-shore, etc." (Ibid.)

² 1 Washburn on Real Property, 2, 3. "This division rests upon the feudal notions of property, whereas the distinction recognized by the civil law was into *res mancipii*, and *res nec mancipii*, things which might or might not be handled, or *corporeal* and *incorporeal*." (1 Greenleaf's Cruise on Real Property, 46.) If a tree grows so near the confines of the land of two adjoining proprietors that the roots extend into and the limbs overhang the adjoining close, yet the property in the tree belongs to the owner of the land on which the tree was planted. The proprietor of the adjoining close may remove the branches which overhang his land; but he may not convert them, nor the fruit, to his own use." (1 Greenleaf's Cruise on Real Property, 46, Note 3; *Holden v. Coates*, 1 M. & Malk. 112; *Masters v. Pollie*, 2 Roll. R. 141; *Lyman v. Hale*, 11 Conn. 177; *Beardslee v. French*, 7 Conn. 125.) But *quere*, whether he may remove branches after they have overhung his land twenty years. (*Pope v. Garland*, 2 Y. & Col. 403.)

fewer than those known and recognized by the English law. We have no such rights as advowsons, tithes, dignities, and franchises of the chase, incident to a form of government and condition of the people different from that existing in the United States; but, as in the mother country, our law recognizes such incorporeal hereditaments as commons, ways, easements, aquatic rights, officers, franchises, annuities, and rents.¹

§ 355. A fee-simple is the largest possible estate which a man can have in lands; it is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally. It is an estate of perpetuity, and is characterized by the absolute power of disposition; and the term "fee-simple" implies an entire right and ability to do with the property whatever the holder of the title may choose, subject only to the police regulations, and rights of eminent domain; the term sometimes used of "fee-simple absolute" is but surplusage as to the last word, and no person is capable of having a greater estate or interest in land than the fee-simple.

Every restraint upon alienation is inconsistent with the nature of a fee-simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a time, or the like, or not to a particular person, it ceases to be a fee-simple, and becomes a fee subject to a condition.²

§ 356. Estates tail, or, as sometimes denominated, estates in fee-tail, are estates of inheritance, which, instead of descending to heirs, generally go to the heirs of the donee's body, his children born in wedlock, and, through them, his grandchildren,

² 1 Greenleaf's Cruise on Real Property, 47; 3 Kent's Com. 403. A corporate right to select and acquire land for the purposes of a charter, such as to build a railroad, or dig a canal, is an incorporeal hereditament. (*Chesapeake & Ohio R. R. Co. v. B. & O. R. R. Co.* 4 Gill & Johns. 1.) So is a permanent right to flow lands. (*Harris v. Miller*, 1 Meigs, 158.) So has been held a ferry right. (*Bowmen v. Wather*, 2 McLean, 176; *Bridges v. Purcell*, 1 Dev. & Bat. 192; 1 Washburn on Real Prop. 3-43.)

¹ 4 Kent's Com. 5; 1 Washburn on Real Prop. 57-79; 1 Green. Cr. 37-38; 1 Cruise Dig. 55; 1 Prest. Est. 431; 1 Wash. Real Prop. 67, Note 1. "Though the term fee-simple is applied in the manner above stated, and Coke divides it into fee-simple absolute, fee-simple conditional, and fee-simple qualified, or base fee; yet, in point of accuracy, it cannot be properly a fee-simple if it is either base, conditional, or qualified."

great-grandchildren, etc., in direct line, so long as his posterity endures in a regular order and course of descent, and upon the death of the first owner, without issue, the estate determines. Estates tail were introduced into America with the other parts of the English jurisprudence, and subsisted in full force until the Revolution, which, in effect, by destroying all titles of nobility in the United States, swept away the chief inducement to the maintenance of this system of estates, and estates in fee-tail are now almost obsolete in this country, and are in most of the States abolished by legislative enactment.¹

§ 357. An estate for life is a freehold estate, not of inheritance, but which is held by a person during his own life, or the life or lives of others. When the measure of the duration is the life of the holder of the estate, it is called an "estate for the tenant's own life"; when the estate is for the life of another person, it is designated "an estate *per autre vie*." Common instances of estates for lives are where a grant is made to one expressly for his life, or to a woman as long as she shall remain a widow, or to a man and wife so long as they shall both live; so the reservation by a grantor of the use and control of the granted premises during his life, creates in him a life estate with all its incidents, and if a dowress conveys her estate to another the latter becomes thereby a tenant for life *per autre vie*. The chief incidents of life estates are a right to take reasonable estovers, and freedom from injury by a sudden termination or disturbance of the estate.²

§ 358. An estate by curtesy is such as the husband takes upon the death of the wife, in the real property of which she died seized, provided they have had lawful issue born alive, and possibly capable of inheriting her estate; this estate is not con-

¹ 1 Washburn Real Prop. 87-100. "The doctrine of entailment of estates in families was never consonant to the genius of the people of this country, and even in the few States where the form of estates tail remains, the application of it is very rare. And the facility with which even these may be barred by alienating them renders the possibility of creating them of little practical importance, though it does not do away with the necessity of understanding the rules by which such estates are governed." (4 Kent's Com. 15.)

² 1 Washburn on Real Prop. 101-47; 4 Kent's Com. 22; Preston on Estates, Vol. 1, 206-10; Wright on Tenures, 190.

fined, however, to such property as the wife has at the time of her death the legal right to, but also extends to her equitable rights in lands. The origin of this title is not clear—as to whether it is from the English law originally, or from the ancient sources of the civil law; but, whatever its origin, it has become, and for a long period been, a well known estate at common law; but, although a part of our fundamental law, received through the adoption of the common law, its existence in America has been hampered with statute laws to such an extent as to have lost many of its attributes and characteristics.

The essential requisites to entitle a husband to curtesy are: marriage, seizin of the wife during coverture, birth of the child alive during the life of the wife, and lastly, death of the wife while the husband lives. Upon the death of the wife, the husband is at once in as tenant by the curtesy, without having resort to a preliminary form to consummate his title to the property.¹

§ 359. Dower is a provision for the wife which the law makes for her support, after her husband's death, out of his real property. In America, though the right of dower has been modified, and is not uniform through all the States, it has been regarded with favor. In most of the States, practically—California, Louisiana, and Indiana making the exceptions—dower is found to exist, in some form, and substantially, in most of them, like the dower of the common law.

The characteristic feature of the law of dower is that the wife takes, at once, a right of dower, generally an undivided

¹ 4 Kent's Com. 26; Bouvier's Law Dic. Vol 1, p. 539; 1 Wash. Real Prop. 148-70; Greenleaf's Cruise on Real Prop. Vol. 1, pp. 152-70. In Iowa, estate by curtesy is abolished, but the husband takes the same estate in the property left by the wife that she would have had in his by dower. No estate by curtesy exists in Louisiana, or in California, Indiana, Michigan, Dakota, or Nevada.

In New York, it would seem that the wife, by her separate conveyance, may defeat her husband's estate by curtesy. (*Thurber v. Townsend*, 22 N. Y. 517.) The right is expressly given by statute in Maine, Massachusetts, Rhode Island, Delaware, Minnesota, Kentucky, New York, Vermont, and Wisconsin.

The estate thus acquired by the husband terminates with his life, and inasmuch as he, generally, must join his wife in any conveyance which in her lifetime she could make, it results practically that curtesy extends but little, if at all, beyond the property of which the wife dies seized. (1 Wash. Real Prop. 141; *Heath v. White*, 5 Conn. 235.)

one-third part in all such real property as the husband is seized of during coverture; this right, however, is contingent upon her surviving him, and may be parted with by her joining the husband in a conveyance of the land, by which she does not part with an estate, as she has none while the husband lives, but she "bars her claim" of dower by joining her husband in a deed to a third person.¹

§ 360. Estate for years is an interest in lands, by virtue of some contract for the possession of them, for a definite, limited period of time. In accordance with the Statute of Frauds, a tenancy for a term longer than one year must be by lease, in writing, and, in some of the States, be accompanied by the formalities of a conveyance of the fee-simple. In the following States, the English rule prevails: Alabama, Arkansas, Georgia, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin, while in others the requirement is either simply that it may be executed by a party, or his agent or attorney, "lawfully authorized."²

§ 361. An estate at will is where one man lets land to another to hold at the will of the lessor, as appears from the definitions given by the earlier text-writers, and recognized by Chancellor Kent;³ and by Littleton it is said that such a tenancy may be terminated *instantly*, by a demand of the possessor.⁴ But the more common definition is that by Bouvier: "An estate in lands which the tenant has by entry made thereon under a demise to hold during the joint wills of the parties to the same."⁵

¹ Greenleaf's Cruise on Real Prop. Vol. 1, 170; 4 Kent's Com. 34; 1 Wash. Real Prop. 169; 2 Black. Com. Chap. 8; Coke upon Littleton, 30-41; Lambert on Dower.

² Bouv. Law Dic. 540; Coke upon Littleton, 43b, 54b; Washburn on Real Prop. Vol. 1, 393; Browne on Frauds, 503-31; Wallace v. McCullough, 1 Rich. Eq. (S. C.) 417; Gardner v. Gardner, 6 Cush. 117.

A stipulation in a lease for years is a valid one that the crops shall be the lessor's until the rent is paid, binding, not only the parties to the contract, but third parties also. (Cooper v. Cole, 38 Vern. 191; Smith v. Atkins, 18 Vern. 461.)

³ 4 Kent's Com. 111.

⁴ Litt. Sec. 68; Doe v. McKaeg, 10 Barn. & Cress. 721.

⁵ 1 Bouv. Law Dic. 540; 1 Wash. Real Prop. 370.

An estate by sufferance is where a tenant has come rightfully into possession of lands by permission of the owner, and continues to occupy the same after the time for which, by such permission, he has a right to hold the same. He comes in by right, and holds over without right. He holds without right, but yet he is not a trespasser. He has a mere naked possession, without being entitled to notice to quit.¹

§ 362. A joint tenancy is where several persons have any subject of property jointly between them in equal shares by purchase. A joint tenancy can only be created by purchase or act of the parties, and not by descent or operation of law. It must, moreover, be created by one and the same act, deed, or devise, and joint disisors may become joint tenants.

The most peculiar and distinguishing feature of this estate is the *jus accrescendi*, or right of survivorship, by which, on the death of one joint tenant, his title vests in the person who held with and who survives him.

By the common law in England, if an estate is conveyed to two or more persons without indicating how the same is to be held, it will be understood to be a joint tenancy, but the policy of American law is opposed to the notion of survivorship, and therefore regards such estates as tenancies in common. In many of the States joint tenancies are abolished by statute, except in special trusts wherein the trustees have no personal interest, and the tendency of the law in the United States is to deprecate any recognition of the estate of joint tenancy by making it a tenancy in common.²

¹ 1 Wash. Real Prop. 533 et seq.; 2 Black. Com. 150; Smith's Landlord and Tenant, 217; Doe v. Hull, 2 D. & R. 38; Russell v. Fabyan, 34 N. H. 218; Uridias v. Morrill, 25 Cal. 35; 1 Bouv. Law Dic. 540. "If the tenant has left the house, the landlord may break in the doors." "And the modern rule seems to be that the landlord may use force to regain possession, subject only to indictment if any injury is committed against the public peace."

² Bl. Com. Book 2, Chap. 12; Kent's Com. Sec. 64; Coke upon Litt. 179a, 188b; Greenleaf's Cruise on Real Prop. Vol. 1, 828; 1 Wash. Real Prop. 532-60; Williams' Real Prop. 112; 1 Bl. Com. 180; Bouv. Law Dic. "Estate of Joint Tenancy." In the following States, every estate granted or devised to two or more persons in their own right is construed to be a tenancy in common, unless expressly provided, or by manifest implication declared, to be a joint tenancy, namely: Massachusetts, Maine, Vermont, New Hampshire, Rhode Island, New Jersey, New York, Michigan, Minnesota, Wisconsin, Illinois, Delaware, Arkan-

§ 363. A tenancy in common is where two or more hold possession of real property by unity of possession; they may hold by several and distinct titles, or by title derived at the same time by deed or descent. In this respect, the American differs from the English law. This tenancy, by the common law, is recognized as being created by deed or will, or by change of title from a joint tenancy, or it may occur by operation of law. In the United States, it may be created by descent, as by deed or will; and whether the estate be created by act of the party, or by descent, in either case tenants in common are deemed to have several and distinct freeholds, for that circumstance is a leading characteristic of tenancy in common.

Each owner, in respect to his share or interest in the property, has all the rights, except that of sole possession, which the owner of title in fee-simple possesses; he may convey his interest to a stranger without consulting his cotenant, and if he purposes a conveyance to his cotenant, it must be by deed as to a stranger to the title; to the extent of his interest he holds the title free and clear from interference from his cotenant, and may manage his part of the estate as he pleases, so long as he does not injure his cotenant; and even if he join with his cotenant in a deed or lease, the instrument is deemed to be the separate indenture of each of the tenants in common.

Either tenant in common may terminate the relation by an action for partition, but, inasmuch as the condition for an estate in severalty is in each instance dependent upon all the cotenants joining in making it, all the tenants in common must be brought before the Court and made parties to the suit; and so also of voluntary division of property thus held in common, all the factions represented by the entire tenancy in common must be joined, to make as to each parcel a unit of the entire title, or the partition is invalid.¹

sas, Mississippi, Missouri, California, Indiana, Iowa, Maryland, Oregon, and Kansas, the exceptions generally being where estates are vested in trustees or executors, and in the statutes of these States, estates held by two or more as executors or trustees, and estates where, for the purpose of a declared trust, the intention of the donor is expressed that the part of one donee, dying, shall go to the survivors, are expressly excepted, making by the exception the rule more strong.

¹ Wash. Real Prop. 416-22; 4 Kent's Com. 367-73; 2 Bl. Com. Chap. 12; Coke on Litt. 188b-200b; Green. Cr. on Real Prop. Note 1, pp. 868-88. If one tenant in

common occupies and cultivates and derives profit from more than his share of the estate, he may be held accountable for such net excess of profits. (*Holt v. Robertson*, *McMullen*, Chap. 475; *Hancock v. Day*, *Ibid*, 298; *Thompson v. Bostick*, *Ibid*, 75.)

The law, independent of statute, as to making repairs upon common property if either cotenant is unwilling to join in the same, seems to be this: One tenant in common cannot go on and make improvements or repairs upon the common property, and make his cotenant liable for any part of the same. (1 *Wash. Real Prop.* 421; *Crest v. Jacks*, 3 *Watts*, 239; *Taylor v. Baldwin*, 10 *Barb.* 582; *Stevens v. Thompson*, 17 *N. H.* 109.)

It has been lately held that a tenant in common cannot, by prescription, obtain a right of way over the common property to his lands held in severalty. (*Crippen v. Morse*, 49 *N. Y.* 63.)

CHAPTER XXXIII.

RIGHT OF WAY.

- § 364. Easements and servitudes.
- § 365. General characteristics of easements.
- § 366. Easements may be either positive or negative.
- § 367. Right of land-owner in soil of road.
- § 368. Ways are appendant or appurtenant, when.
- § 369. A right of way may be in gross.
- § 370. A way of necessity.
- § 371. Presumptions as to way of necessity.
- § 372. Meaning of the words "a way of necessity."
- § 373. A way by grant.
- § 374. Implied grant of way when land is sold.
- § 375. What use of land implied by grant of way.
- § 376. Repairs of road over another's land.
- § 377. A way by prescription or user.
- § 378. Statute of Limitations the measure of time of user.

§ 364. Easements and servitudes.—An easement is the right of making use of the real property of others, by the public or individuals, for a precise and definite purpose, not inconsistent with the general right of property in the owner. The owner of the fee is not affected in his rights other than so far as is requisite for the protection of the holder of the easement, or, as it is sometimes termed, servitude. The existence of two distinct estates is implied in the existence of an easement: the one in favor, or for the benefit of which it exists, which is usually denominated the *dominant*, and the other, over or upon which it is exercised, called the *servient*.¹ From the very nature of things there is an antagonism between these two, and when both estates pass into one person the easement is at once extinguished.²

¹ 1 Bouv. Law Dic. 516; 3 Kent's Com. 418-19; 2 Wash. Real Prop. 25; Washburn on Easements and Servitudes, 4; Ritger v. Parker, 8 Cush. 145.

² "An easement or servitude is a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor." (Ritger v. Parker, 8 Cush. 145; Brakelee v. Sharp, 1 Stoct. 9; Doe v. Wood, 2 Barn. & Ald. 724; Denton v. Liddell, 23 N. J. Eq. 64.)

§ 365. General characteristics of easements.—Easements are as various as the exigencies of domestic convenience, or the purposes to which real property can be applied. All easements must originate in a grant or agreement, either express or implied, by the owner of the servient estate to the recipient of the dominant. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring actual and uninterrupted enjoyment, immemorially, or for upwards of the period of time prescribed by the Statute of Limitations for bringing actions for recovery of lands.¹

§ 366. Easements may be either positive or negative, that is to say, they may authorize the commission of acts actually injurious to the servient estate; as a right of way, or negative, being only consequently injurious, as preventing the owner of the servient estate from so using his land, by building on it or otherwise, to the obstruction of light or air from the dominant tenement.²

§ 367. Right of land-owner in soil of road.—Right of way, if not first in importance among rural servitudes upon

¹ "In respect to the length of time during which there must be an uninterrupted adverse user and enjoyment by the owner of one piece of land, of what he claims as an easement in that of another, in order to establish such a claim, it may be stated, as a general proposition, that it is commensurate with the time within which, by the local law, the right of making an entry into lands or bringing ejectment is limited." (2 Wash. Real Prop. 49.)

Gale & Whatman, Ease. 94; *Daniel v. North*, 11 East, 370. But to constitute such an adverse enjoyment of an easement, it must be had while there is some one to whom such use is adverse. (*Hoy v. Stewart*, 2 Watts, 327; *Hurlbut v. Leonard*, Brayt. 201; *Manning v. Smith*, 6 Conn. 289; *Felton v. Simpson*, 11 Ind. 84.) A son occupied, by permission, for eighteen years, a farm belonging to his father's estate, and then purchased the farm. During all these eighteen years, and for more than two years next following, he used a well on an adjoining farm, also belonging to his father's estate; whereupon a purchaser of the latter farm forbade the son to use the well. Held, that the son had acquired no title to the use of the well; his use of it had not been adverse to the servient estate. (*Stevens v. Dennett*, 51 N. H. 324.)

² *Tudor Lead. Cas.* 107; 2 Wash. Real Prop. 26; *Wolf v. Frost*, 4 Sandf. Ch. 71, 89; *Gale & Whatl. Ease.* 52; *Grant v. Chase*, 17 Mass. 443-7; *Seymour v. Lewis*, 13 N. J. 450.

"A parol license to enter on lands will excuse what otherwise would be a trespass." (*Owens v. Lewis*, 66 Ind. 488.)

"A license confers only a privilege, and does not pass an estate, and may be

lands, is, perhaps, the most familiar and most often called into notice. Highways are regarded as easements; the public, by their location, acquires a right of way over roads, but the title to the soil often, if not as a general rule, remains with the original owner. The use may be so entire as to wholly deprive the owner of the fee of a beneficial estate, apart from such as he may have as a part of the body politic; but, should the highway be abandoned, his original estate stands intact and released from the servitude, and to this circumstance is to be ascribed the popular custom of describing lands abutting upon a public road, in conveyances, as running to the center of the highway.¹

The public have an easement to the extent of the use requisite for the purposes of the road, may use the soil, timber, and stone found on the land, to keep in repair the road, but the owner of the fee is entitled to all mines, quarries, springs of water, and earth for every purpose not incompatible with the public use of the land as a road.²

revoked or countermanded at any time by the licenser." (*Owens v. Lewis*, 66 Ind. 488.)

¹ *Morgan v. Stone*, 3 Gray, 319; *Hancock v. Wentworth*, 5 Metc. 446; *Jerman v. Mathews*, 2 Bail. 271. "This incorporeal hereditament is a right of passage over another man's ground. It may arise either by grant of the owner of the soil, or by prescription which supposes a grant, or from necessity." (3 Kent's Com. 420; *Derickson v. Springer*, 5 Harring. 21.)

"The extent to which the owner of agricultural lands, subject to a right of way by the owners of the same description of lands, may obstruct or interfere with the use of them by gates or bars, is to be determined by the necessity of the erection of such obstructions for the protection of his other property, and in every case the question is for the jury." (*Huson v. Young*, 4 Lans. 63.)

² "Highways are regarded as easements. The public acquire, by their location, a right of way, with the powers and privileges incident to that right, such as digging the soil, using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the road-bed and bridges. The former proprietor of the soil still retains his exclusive right to all the mines, quarries, springs of water, timber, and earth, for every purpose incompatible with the public right of way. The person in whom is the fee of the road may maintain trespass, ejectment, or waste in respect to the same, and upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revert in the proprietor of the soil." (*Washburn on Easements*, 159; *Jackson v. Hathaway*, 15 Johns. 447; *Westbrook v. North*, 2 Me. 179; *Robbins v. Boorman*, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57; *Harbock v. Boston*, 10 Cush. 259.)

"A railroad has no right to use a common road without legislative authority, which has been vacated. The right to the soil remained in the owner, and on the vacation of the road reverts to him." (*Phillips v. R. R. Co.* Supreme Court Penn. May 10, 1875.)

§ 368. Ways are appendant or appurtenant when they are incident to an estate. They must inhere in the land, concern the premises, and be essentially necessary to the enjoyment of the dominant estate; they are, in effect, covenants running with the land, both that over which the way extends and the premises to which the way is requisite.

A grant of way over premises will be construed to be a general way for all purposes, unless, from the grant or use, there appear restrictive terms or special use; and where a special use is granted, the recipient may be restricted to that use, and compelled to maintain such gates or bars as will confine him to the special grant.¹

§ 369. A right of way may be in gross, that is, attached to the person using it or to whom it is granted alone, or it may be appurtenant to land to which it leads, and unless expressly shown to be a personal privilege to him to whom it has been granted, it will be presumed to be appurtenant to the dominant estate, and pass to the grantee thereof by deed.²

§ 370. A way of necessity is where a man sells land, to reach which, from the public highway a passage must be had over the land of the vendor. In selling real property the law

¹ 3 Kent's Com. 420. "When a right of way is appedient or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant." *Child v. Campbell*, 5 Selden, 246; *Sevilles v. Hastings*, 24 Barb. 44; *Huttenmeier v. Albro*, 18 N. Y. 48; *Staples v. Haydon*, 6 Mod. 3, in which it was said: "If one seized of lot A and lot B, and he used a way from lot B to mill, or to a river, and he sells lot A, with all ways and easements, the grantee shall have the same privilege of passing over lot B which the grantor had." (Wash. Ease. 8, 9.)

And where an easement has been granted by a deed-poll, which also provides for the performance by the grantees of a certain act, they will, if they accept the deed, be bound by the stipulation therein contained; and a subsequent sale of the land will not relieve them of the obligation, although the deed contain no mention of any such agreement on their part. (*Elting v. Clinton Mills Co.* 36 Conn. 296.) If such agreement is a contract running with the land, it passes by the sale of the land to the purchaser. If it is a personal contract, not running with the land, it is a chose in action vesting in the grantor, and subject, like other choses in action, to assignment. (*Ibid.*)

² 2 Kent's Com. 420. "If it be a right of way *in gross*, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and it is so exclusively personal that the owner of the right cannot take another person in company with him." (1 Roll. Abr. 391; Wash. Ease. 8.)

presumes the parties to have had in view, in making the contract, the rational enjoyment of the premises by the vendee; and in selling the land the original owner is presumed to have known, and had in view, the circumstance that he held the power of such enjoyment from his purchaser by being alone able to give him access to the road, which enables him to enjoy the property purchased. Hence, the law presumes a grant by the vendor from the land sold over his premises to the highway.¹

§ 371. Presumptions as to way of necessity.—The presumptions of the knowledge of the owner of the land that a way is being used, and of the necessities of the case, are based only upon such an absolute necessity as to preclude all doubt of the minds of the contracting parties having met and agreed upon this grant of right of way, and therefore a mere convenience is not the test—the necessity must be absolute; and it has even been held that where land conveyed was surrounded on all sides but one by water, and there was no access to it by land, except over the grantor's land, such a necessity was not presented as to raise an implied grant of a right of way over the land of the vendor, and that mere convenience was not the test.² But on the other hand it has appeared that the Courts have been sometimes inclined to regard this matter of a way by necessity from a standpoint and premises characterized by greater liberality, and to hold that the necessity need not be

¹ 3 Kent's Com. 420. "A right of way may arise from the necessity in several respects. Thus, if a man sells land to another, which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his own land. The way is a necessary incident to the grant, and without which the grant would be useless." (*Clarke v. Cogge*, Cro. Jac. 170; *Turnbull v. Rivers*, 3 McCord, 131.) All the authorities support the doctrine, says Mr. Woolrych, in his treatise on the Law of Ways, p. 21, that in the case of a grant of land without reservation of any way, a way of necessity will pass as incident to the grant. (*Howton v. Frearson*, 8 Term Rep. 50.) "The general rule is, that when a thing is granted, everything is granted by which the grantee may have and enjoy such use." (3 Kent's Com. 421; Co. Litt. 56.)

² *Turnbull v. Rivers*, 3 McCord, 131; *Cooper v. Maupin*, 6 Mo. 624; *Anderson v. Buchannan*, 8 Ind. 132. Chancellor Kent, however, gives the rule as follows: "The general rule is, that when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use." (3 Kent's Com. 421.) But the general tenor of decisions is to the effect that the necessity must be real and well established in order to create a right of way. Convenience alone is not sufficient to raise the implication of a right of way. (*Valley Falls Co. v. Dolan*, 9 R. I. 489; *Serevene v. Gregorie*, 8 Rich. 158.)

absolute and irresistible, but such as sensible persons might reasonably be deemed to have considered in making a purchase, and that a mere inconvenience may be so great as to raise such an implied grant of right of way.¹

§ 372. Meaning of the words "a way of necessity."—

A way of necessity is not precisely what the words might seem to import, giving to them their ordinary signification. It must not be assumed that because one tract of land is separated by another from the highway, that the owner of the former has a right of way thence to the road over the intervening land; and it is not this general necessity for communication with the main thoroughfare which has given rise to the designatory expression, "a way of necessity." It is where a sale of land is made by the owner of that which so intervenes and separates from the highway the tract sold, that the law presumes the grant of that easement with which alone the grant of the land is of value to the grantee. The right of way when claimed by necessity is founded entirely upon grant, and derives its force and vigor from it. It is either created by express words or by operation of law as incident to the grant, so that in both cases the grant is the foundation of the title. There cannot legally exist a general way of necessity without reference to the manner whereby the land over which the way is claimed became charged with the burden, and it hence results that there can be established no way of necessity without showing that by grant, actually made by the owner of the intervening lands, or such as the law presumes him to have made when he sold the tract, removed and separated from the highway he granted the way to and from the land sold,² except where the owner of

¹ Washburn on Easements, 163; *Lawson v. Rivers*, 2 McCord, 445; *Morris v. Edginton*, 3 Taunt. 230. Whether a man who himself owns the land over which a way of necessity in favor of other land which he owns exists, loses his right by necessity to the second piece by selling the first, is not free from question, if in the sale he is so improvident as to neglect to reserve a right of way. (3 Kent's Com. 422.) But it would appear that the circumstances creating the necessity would raise an implication of the grantor having reserved a way, as much as it would one of a grant of way having been made, which is the sole basis on which stands the way by necessity. (3 Kent's Com. 422-3; *Holmes v. Goring et al.* 2 Bing. 76; *Collins v. Prentice*, 15 Conn. 39; *Miller v. Lapham*, 44 Vt. 416.)

² *Wild v. Deig*, 43 Ind. 455; 2 Wash. Real Prop. 282, 3d Ed.; 3 Kent's Com. 423; 2 Bl. Com. 36; *Stewart v. Hartman*, 46 Ind. 332. "A way of necessity derives

both tracts sells that removed from the road, in which case a reservation of way may be presumed.

§ 373. A way by grant is where an easement of this character is conveyed by the owner of the servient to him who thereby becomes the holder of the dominant estate.

As a general proposition, a grant of an estate with "ways heretofore used," or "ways in use," or the like general terms of description as to right of way, will pass to the grantee all ways in actual use at the time of the grant. And where a grant of right of way is made without any precise description of the route, it will become fixed by use and acts of acquiescence by the parties in interest.¹

§ 374. Implied grant of way by sale of land.—A grant of right of way is implied by sale of lands bounded upon streets or roads, or laid down in maps made at the instance of the owner of the fee in the lands over which the roads or streets run.²

It has been questioned how far the grant of a way for agricultural purposes is a general right of way, and from the general tenor of decisions it appears to be one of a limited and qualified character; and if from the terms of the grant it is apparent that the grant is for a specified purpose, the use of it may be confined to that purpose.³

its origin from a grant, and cannot legally exist where neither the party claiming the way, nor the owner of the land over which it is claimed, nor any one under whom they, or either of them, claim, was ever seized of both tracts of land."

¹ Parol evidence is competent to prove the existence of an easement, and especially to point the words of the deed to the object they are intended to designate and grant. (*Brown v. Berry*, 9 Coldw. 98; *Bump v. Laner*, 37 Md. 621.) A deed conveying land with right of access to it "over other land of the grantor, as heretofore used," imports only an actual use. (*Bigelow C. Co. v. Clinton*, 108 Mass. 70; *Fonda v. Borst*, 2 Abb. [N. Y.] App. 155.)

² The purchaser of rural property, under a deed in which the grantor bounds the premises conveyed by a road or proposed road over land retained by him, is entitled to a right of way over such land. (*Fonda v. Borst*, 2 Abb. [N. Y.] App. Dec. 155; *Washburn on Easements*, 170; *James v. Jenkins*, 34 Md. 1; *Bump v. Laner*, 37 Md. 621.)

Where one, in a plan of lots, laid out an alley between the rear of two tiers of lots, and conveyed the lots as bounding on the alley to different persons: Held, that the alley could not be abandoned without the consent of all the lot-holders. (*McKee v. Parchment*, 69 Penn. Stats. 342.)

³ *Cowling v. Higginson*, 4 Mees. & W. 245, in which a right of way for agri-

§ 375. What use of land is implied by grant of way.—

The grant of a right of way carries with it all rights to the use of the soil which are properly incident to the free exercise and enjoyment of the right granted or reserved; but, on the other hand, the owner of the land over which the right of way exists may make any and all use of the soil, and all profits which can be derived from it, consistently with the enjoyment of the easement. He may maintain ejectment to recover the land from a stranger. He may dig away the soil, sink a drain under the roadway, take away stone, or do any other thing which, as owner of the fee, he might have done if the right of way had not been granted, so long as the dominant right of easement is not affected.¹

cultural purposes was held not to be a right to use the way to haul coal from a coal-bed. *Jackson v. Stacey*, Holt, N. P. 455, in which it was held that a farm-way over land of another did not include the right to haul lime from a quarry.

¹ Washburn on Easements, 196. "So the owner of the soil of a way, whether public or private, may make any and all uses to which the land can be applied." (*Perley v. Chandler*, 6 Mass. 454; *Green v. Chelsea*, 24 Pick. 71; *Pomeroy v. Mills*, 3 Vt. 279; *Lade v. Shepherd*, 2 Strange, 10,004; *Adams v. Emerson*, 6 Pick. 57; *Atkins v. Boardman*, 2 Metc. 457.)

An excellent article in a late periodical thus treats of this subject: "To what purposes a right of way over adjoining property may be extended is sometimes a difficult question. A thorough exposition of the law on the subject was given in *Wimbledon and Putney Commons Conservators v. Dixon*, 33 L. T. Rep. (N. S.) 679. The owner of a farm adjoining a common, and to which access for horses and carriages had been obtained from time immemorial by ancient tracks over the common from one point to another, but by no clearly defined road, sought to erect houses on a portion of his farm, and use a road which had recently been made in substitution for the ancient tracks over the common, for the purpose of drawing building materials, intending afterward to use it as a means of access to the houses when built. Held, that the owner of the farm had no right to increase the burden of the servient tenement by changing the character of his property, and that an injunction would be granted to restrain the owner of the farm from drawing the materials for the erection of the proposed houses, and from any other excessive user of the road. The decision was made, notwithstanding the fact that, in addition to using the ancient tracks for access to the farm for ordinary agricultural purposes, the owner or his predecessors had also drawn over the tracks building materials for adding a wing to the farm-house, and for converting a mud-hovel into a brick cottage. In *Cowling v. Higginson*, 4 M. & W. 256, Lord Abinger, C. B., said: 'If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes.' And similar language was used in the same case by Parke, B. But in *Wimbledon and Putney Commons Conservators v. Dixon*, Lord Justice James said that 'when we consider these *dicta* and observations, in connection with the very clear language of the Court of Queen's Bench in *Allen v. Gomme*, 11 A. & E. 759, and of Lord Chief Justice Bovill and Mr. Justice Willes, in the case of *Williams v. James*, 16 L. T. Rep. (N. S.) 664, L. R. 2 C. P. 577, I am quite

§ 376. Repairs of road over another's land by the person who enjoys the easement.—In the matter of repairs to a private way over another's land, it is the duty of the owner of the way to keep it in repair. It is due to himself that he so keep the way in order as, in case of the established road or route of way becoming obstructed or impaired from overflow or other cause, the owner of a private way over another's land might not be permitted to pass over any other route.¹

§ 377. A way by prescription or user is, in effect, the same as a distinct grant; a convenient fiction in law is made use of, upon the hypothesis that the owner of the land over which the way extends has granted a right of way. It cannot be supposed, where there has been a long exercise and possession of a way over another's land, that the owner of the fee would

satisfied that the true principle is the principle laid down in the later cases, namely: that you cannot, from evidence of user of property in its original state, infer a right to use it in whatever form and for whatever purpose that property may be changed; that is to say, if there be a right of way, however general, for whatever purposes, to a field, the person who is the owner of the field cannot from that say, I have the right to turn that field into a manufactory, or into a town or tan-yard, and then use the right of way for the purposes of the manufactory or town so built.' See on this subject *Atkins v. Boardman*, 2 Metc. 457; and cases cited in Washburn on Easements, 3d Ed. Sec. 4." (13 A. L. J. 157, March 4th, 1876.)

¹ The rule in this behalf is thus given by Washburn in his treatise on Easements, p. 196: "The owner of a private way may enter upon the same and repair it or put it into a condition to be used; and, ordinarily, it is incumbent upon the owner of the way to keep it in repair. Nor would he have the right to go outside of the limits of such way, if defined and designated, in passing from one point to another, although the way was impassable by being overflowed or out of repair. But a different rule prevails in respect to public ways. Though even then, he could only justify removing enough of the fences of the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury." (*Gerrard v. Cooke*, 2 Bos. & P. N. R. 109; *Taylor v. Whitehead*, 2 Doug. 745; *Mellara v. Harrison*, 4 Maule & S. 387; *Campbell v. Race*, 7 Cush. 406; *Williams v. Safford*, 7 Barb. 309; 3 Kent's Com. 424.) "There is a temporary right of way over the adjoining land if the highway be out of repair, or be otherwise impassable, as by a flood. But this right of going upon the adjoining land applies to public and not to private ways. A person having a right to a private way over another's land has no right to go upon the adjoining land, even though the private way be impassable or foundrous, by being overflowed by a river. The reason given is, that the owner of a way may be bound to repair, and the impassable state of the private way may be owing to his neglect; but if public roads become impassable, it is for the general good that the people should be entitled to pass in another direction."

have suffered his neighbor for a great length of time to travel over his premises unless he was bound to do so by an executed grant. Hence it has become usual, where a way has been used from time immemorial, or a period of time equivalent to that prescribed by the Statute of Limitations for bringing actions for the recovery of real property, to presume that a grant of way has been made.¹

§ 378. The Statute of Limitations the measure of time of user.—The result from the decisions is such that the modern doctrine of prescription requires merely a user and enjoyment of the way over another's land. The period of time prescribed by the Statutes of Limitation is generally twenty years, instead of the former requirement of immemorial enjoyment. But there seems to be one distinction between ancient and modern prescription which should be noticed, which is, that while under the ancient doctrine of prescription such an enjoyment was regarded as conclusive evidence of a grant which had been lost, prescription, as known in modern times, only raises a legal presumption of such title, which may be rebutted by other legal evidence.²

¹ Washburn on Easements, 66; Tudor's Lead. Cas. 114; *Coe v. Wolcottville* M. Co. 35 Conn. 175. "The provisions of the Connecticut statute relating to the time of entry by the owner on lands of which he is disseized, apply to easements adversely used. Where an easement is established by prescription, or inferred from user, it is limited to the actual user. A right claimed by user is only co-extensive with the user." (*Brooks v. Curtis*, 4 Lans. 283; *Wash. on Ease.* 84; 1 *Green. Ev. Sec.* 17, Note; *Sherwood v. Burr*, 4 Day, 244.)

² *Wash. Ease.* 67; *Sargeant v. Ballard*, 9 Pick. 255; *Campbell v. Wilson*, 3 East, 294; *Linnett v. Wilson*, 3 Bing. 115; *Tyler v. Wilkinson*, 4 Mason, 397-402. "In respect to the acquisition of an easement by user, no universal rule as to the effect in law of evidence of particular facts can be laid down. Whether long continued use of an easement is adverse, or is in subordination to the title of the true owner, is a matter of fact, to be decided, like other facts, upon evidence, and upon the circumstances of each particular case. The burden of proof to show that it is adverse is on the party claiming rights under the use." (*Bradley's Fish. Co. v. Dudley*, 37 Conn. 136; *Bodfish v. Bodfish*, 105 Mass. 317.)

CHAPTER XXXIV.

RIPARIAN RIGHTS.

- § 379. Lands bounded by navigable waters.
- § 380. Lands bounded on streams not navigable.
- § 381. Ownership of water in a stream.
- § 382. Right of detention of water of a running stream.
- § 383. Rights of owner of land through which a stream runs.
- § 384. General rules as to rights of riparian proprietors.
- § 385. No absolute ownership of water.
- § 386. Each riparian proprietor has a right to use the water.
- § 387. Water may be used for natural purposes.
- § 388. Right to use water for irrigation.
- § 389. Reasonable consumption of water depends on circumstances.
- § 390. Right of proprietor to have water unpolluted.
- § 391. Accretion on land created by alluvium.
- § 392. Island situated in a river.
- § 393. Ownership of water-power of a stream.
- § 394. Mill privilege.

§ 379. Lands bounded by navigable waters.—The title of owners of land bounding upon the ocean, or navigable rivers, wherein the tide ebbs and flows, extends to high-water mark, and the land lying between high and low-water mark belongs to the State.

In England, this strip belongs to the crown, but in America, the sovereignty being the citizens, the title vests in the people at large, although this title may, by the State, be parted with by conveyance to individuals.

The use of the navigable parts of a stream, or of the ocean, bounding upon the land, is inalienable. The sea and navigable rivers are public highways at common law, and everywhere that the English law is the basis of jurisprudence.¹

¹ *Howard v. Ingersoll*, 13 How. 381; *United States v. Pacheco*, 2 Wall. 587-590. "The public have, at common law, a right to navigate over every part of a common navigable river, and on the large lakes; and in England, even, the crown has no right to interfere with the channels of public navigable rivers. They are public highways at common law. The sovereign is trustee for the public, and the use of navigable waters, and the soil under them, belongs to the State in which they are situated, as sovereign." (3 Kent's Com. 427; *Pollard v.*

§ 380. Lands bounding on streams not navigable.—The title to lands which bound upon streams not navigable extends to the center of the stream, unless the terms of grant by which title has been derived clearly manifest that it was the intention of the grantor to limit the estate granted to the bank or margin of the stream; and if a person own land on both sides of the stream, the presumption will be that he owns all the land covered by the same.¹

§ 381. Ownership of water in a stream.—A title to the water in a stream is not, however, to be implied from an ownership of half or all the land in the river-bed; the rights of a riparian proprietor of land over which there is a flowing stream, are to make use of the water, for any and all lawful purposes, while it is passing in its natural current over his land; but in the water itself, as it passes along the stream, he has no property, other than in so far as it is by him actually taken possession of.

Hogan, 3 How. 212; *Stevens v. P. R. R. Co.* 34 N. J. Law, 532; *Green v. Swift*, 47 Cal. 536.)

The title of riparian proprietors, whose lands bound on tide-waters, extends to high-water mark; the title to the belt of land between high and low-water mark is in the State, but may be conveyed by the State to individuals. (*Mathew v. Chapman*, 40 Conn. 382.)

Yates v. Van De Bogart, N. Y. Ct. of Appeals, Feb. 6, 1875. "The land in dispute was a strip upon the west side of a creek; the plaintiff's deed described the land as beginning at a point on the west bank of a creek, thence following said west bank on a general course of N. 4 degrees 24 minutes W.

Held, that this gave the plaintiff the land to the margin of the creek at low-water mark, although a survey of the land, according to the courses and distances mentioned in the deed, would not carry him to the creek, as the creek, being a natural monument, the courses and distances must yield to it."

¹ 3 Kent's Com. 427; *Palmer v. Mulligan*, 3 Caines, 318; *Deerfield v. Adams*, 17 Pick. 41; *Commissioners of the Canal Fund v. Kempshall*, 26 Wend. 404; *Child v. Starr*, 4 Hill, 369-373; *Adams v. Pease*, 2 Conn. 481; *Eason v. McMaster*, Kerr. N. B. 501; *Bowman v. Watken*, 2 McLean, 376. The owner of the bed of a stream or pond has the right to cut and remove ice therefrom; and he may maintain an action of trespass against another who cuts and removes the ice.

State v. Pottmeyer, 33 Ind. 402; *Stetson v. Bangor*, 60 Me. 495. A deed to land bounded "to and on" a pond which was raised to an artificial height in the winter, and allowed in summer to remain at its natural level, held to convey to low-water mark of the pond in its natural state. (*Payne v. Woods*, 108 Mass. 160; *Whitaker v. Burhams*, 67 Barb. 237.)

"The bed and banks of a stream only navigable in times of freshet, for floating logs, belong wholly and absolutely, in the absence of any claim of prescription or user, to the riparian proprietors." (*Hubbard v. Bell*, 54 Ill. 410; *Warren v. Chambers*, 25 Ark. 120.)

§ 382. Right of detention of the water of a running stream.—The person who takes up water-rights, or to whom they pertain by contiguity of land owned, has no right to detain it otherwise than so far as he takes it for use; and the rights of all riparian proprietors on a stream, in respect to the waters thereof, are equal, and no one has a right to so use the water as to prevent it from reaching the proprietor lower down the stream. Inasmuch as his power over the water depends on the party above him being restrained from diverting it, so he must also refrain from such acts as would, if done by some proprietor higher up stream, deprive him of the water.¹

§ 383. Rights of owner of land through which a stream runs.—Every person through whose land a natural water-course runs has a right, *publici juris*, to the benefit of it as it passes through his land, to all useful purposes to which it may be applied; and no proprietor of land on the same water-course, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it.²

§ 384. General rules as to rights of riparian proprietors.—The right of a riparian proprietor in the water which runs through his land is not strictly of the character of an easement. It results from no grant, either actual or constructive, or to be presumed from user for great length of time, but is rather *jure naturæ*, and is an incident of property in

¹ The owner of land through which a stream of water naturally flows has a right to its use, but it is a right of use only. He cannot divert it from the land of another, or obstruct or detain it to the injury of such other, without making himself liable. (*Pollitt v. Long*, 58 Barb. 20; *Agawam Canal Co. v. Edwards*, 36 Conn. 496-7; *O'Riley v. McChesney*, 3 Lans. 278; *Good v. Dodge*, 3 Pittsb. [Pa.] 557.)

² The rule is given in the case of *Wright v. Howard*, 1 Sim. & S. 190-203, by the vice chancellor, as follows: "Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietor above." (3 Kent's Com. 439.)

O'Riley v. McChesney, 3 Lans. 278. "The owner of land through which there flows a stream of water may not divert the same so as to interfere with the enjoyment thereof by the land-owners upon the stream above and below. But this rule does not apply to water falling upon land, as by rain or snow." (*Phinizy v. Augusta*, 47 Ga. 260. Compare *Hough v. Doylestown*, 4 Brews. [Pa.] 333.)

the land—not an appurtenance to it, but rather a quality inseparably annexed to the soil—and passes with it, not as an easement nor as an appurtenance, but as a parcel. Use does not create it, and disuse cannot destroy or suspend it. Unity of possession and title in such land, with the lands above or below it, does not extinguish or suspend it.¹

The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself. *Prima facie*, every proprietor upon each bank of a stream is entitled to the land covered with water in front of his bank to the middle thread of the stream. In virtue of this ownership, he has a right to the use of the water flowing over it, in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but the simple use of it while it passes along.

§ 385. No absolute ownership of the water by riparian proprietor.—The consequence of the principles above noticed is that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the stream. The right being common to all the proprietors on its course, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above.²

§ 386. Each riparian proprietor has a right to use the water.—This general rule must, however, be taken with the inevitable qualification that each may use the water in turn,

¹ Washburn on Easements, 215; Crossley v. Lightowler, L. R. 3 Eq. 296; Bardwell v. Ames, 22 Pick. 333-5.

² Washburn on Easements, 215. "These rights of riparian proprietors, though coming under the head of what are called natural easements, are not, in fact, the result of any supposed grant evidenced by long acquiescence on the part of a superior proprietor of the flow of the water from his land to the land below. The right of enjoying this flow, without disturbance or interruption by any other proprietor, is one *jure naturæ*, and is an incident of property in the land, not an appurtenance to it, like the right he has to the soil itself, in its natural state, unaffected by the tortious acts of a neighboring land-owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant, or twenty years' adverse

and hence the volume is necessarily diminished to the extent requisite to its use; but this natural diminution is so clearly an incident to the existence of the stream as not to constitute, in effect, a violation of the rule, inasmuch as the right of each proprietor is with reference to that of all, and the natural volume of water at each place is not what it would be were there no land above on the stream, but what would be its condition after being subjected to natural uses by the proprietors higher up stream. There must be allowed, of that which is common to all, a reasonable use, otherwise the right would be without value. So the order in which it may be used is naturally provided for by the position of the lands upon the banks of the stream; and if, from successive use along the stream, an owner of lands low down upon its course is deprived of the water, it is but the natural result of the geographical position of his lands.¹

The upper proprietor has a right to make any use of the stream which is beneficial to his estate and himself, which is reasonable, and does not either wholly take away the right of the lower proprietor, or does not practically, and in a perceptible and substantial degree, diminish and impair an equal and common right of the lower proprietor.²

possession." (*Corning v. Troy Factory*, 39 Barb. 311; *Merrifield v. Lombard*, 13 Allen, 16.)

Davis v. Getchell, 50 Me. 604; *Ferrea v. Knippe*, 28 Cal. 343.

¹ 3 Kent's Com. 441. "Pothier lays down the rule very strictly that the owner of the upper stream must not raise the water by dams so as to make it fall with more abundance and greater rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally; for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes." (*North Western U. P. Co. v. Atlee*, 2 Dill. 479.)

² *Cummings v. Bardett*, 10 Cush. 186; *Thomas v. Brackney*, 17 Barb. 654; *Parker v. Hotchkiss*, 25 Conn. 321; *Gould v. Boston Duck Co.* 13 Gray, 442; *Hendrick v. Cook*, 4 Ga. 241; *Gregory v. Nelson*, 41 Cal. 278; *Smith v. O'Hara*, 43 Cal. 371; *Thorp v. Freed*, 1 Mont. 651; *Columbia M. Co. v. Holter*, 1 Mont. 296.

Miller v. Lapham, 44 Vt. 416. "A riparian proprietor who has erected machinery requiring for its propulsion more water than the stream affords at its ordinary stages, has no right to detain the water until a sufficient quantity for his purposes has accumulated, and then discharge it to the injury of the proprietors below. Nor has he a right to build a reservoir and store the water therein for future use in a dry season. The right to detain water, in a time of drouth,

§ 387. Water may be used only for natural purposes.—

The right to consume water so as to deprive of its use the lower riparian proprietors, is confined to natural, as contradistinguished from artificial, uses. The respective lands only have, as an incident, the use of the water, subject, as already seen, to such consumption as would result naturally from its use by those whose lands lie above, but this subjection is not for artificial purposes, because no limit can be put to such consumption and to suffer the water to be used for other than such as are classed as natural uses would, in many instances, be to deprive the lower riparian proprietor of his benefit.

Natural use of water is such as is absolutely necessary for quenching thirst, and household purposes; and in civilized life, water for live-stock is also necessary. These wants must be supplied, or both man and beast will perish; and while numerous questions have arisen as to the liability of land-owners for the manner in which they have applied the water of running streams for irrigation and mill purposes, it has been generally conceded that it is no violation of the rights of any other proprietor for one to use the waters flowing by or over his lands for purely domestic purposes, or in watering his stock; and the proposition appears to be now settled that each proprietor, in his turn, may, if necessary, consume all the water for these purposes, that is, for the supply of these natural wants.¹

extends only to cases where the machinery is adapted to the power of the stream at its usual stage." (*Clinton v. Myers*, 46 N. Y. 511.)

¹ The leading modern case on this point is that of *Evans v. Merriweather*, 3 Scam. 492, in which the Supreme Court of Illinois laid down the general rules applicable in the premises. The stream was a small one; the plaintiff and defendant each had a *steam* mill on the bank of the brook, from the waters of which they obtained sufficient to use in their respective boilers for generating steam; defendant also had, at his mill, on the point of the two, higher up stream, certain large wells, the water from which he also used for generating steam. A drouth materially diminished the volume of water in the brook, and caused the wells to become dry, and defendant thereupon diverted the waters to his wells, and kept them full, so as to insure to himself a sufficient supply of water, but in doing so he took all the water, and plaintiff at his mill below got none. The Court had, therefore, to discuss the proposition whether the entire consumption of a stream by an upper proprietor can, in any case, be a reasonable one. "To answer this question satisfactorily," say the Court, "it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely to be supplied in order to his existence; artificial, such only as by supplying them his comfort and prosperity are increased. To quench thirst, and for household

§ 388. The right to use water of a stream for irrigation.

—Rights of irrigation are perhaps more difficult to subject to abstract rules than any others. Technically, it comes within the class of artificial rather than natural uses, inasmuch as its exercise depends upon some labor and mechanical contrivance or work of man; and how far a riparian proprietor can be permitted to divert the water of the stream has been the subject of repeated judicial inquiry.

The general rule appears to be that the owner of land, by or through which a stream runs, may, in all cases, use so much of the water as is necessary for his family and his live-stock; but he has no right to use it in irrigating his land if he thereby deprives other proprietors of the reasonable use of the water in its natural channel. What is a just and reasonable use may often be a difficult question, depending on various circumstances.¹

purposes, it is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish." "From these premises would result this conclusion, that an individual owning a spring upon his own land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it if necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. Each proprietor may in his turn, if necessary, consume all the water for the supply of these natural wants; and if, beyond the supply of these, any surplus is left, all have a right to participate in its benefits, and no rule can be laid down as to how much each may use without infringing the rights of others. The question, in such cases, must be referred to a jury to say whether a party has, under all the circumstances, used more than his just proportion of the water." And tried by the tests which had thus been premised, the Court held that defendant was not warranted in thus diverting the water to his wells. (*Ingraham v. Hutchinson*, 2 Conn. 584; *Blanchard v. Baker*, 8 Me. 253.)

¹ 3 Kent's Com. 441, Note 2. "A riparian proprietor has the right to irrigate his land from the stream, if he does not interfere with the rights of other proprietors; and whether this use be reasonable or not depends on the circumstances of each case." (*Evans v. Merriweather*, 3 Scamm. 492.)

Pitts v. Lancaster Mills, 13 Metc. 156. "What would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation, or other similar uses, would be an unreasonable and injurious use of a small stream just sufficient to furnish water for domestic uses, for farm-yards, and watering-places for cattle." (*Elliott v. Fitchburg R. R. Co.* 10 Cush. 191.)

§ 389. Reasonable consumption of water depends on circumstances.—The reasonableness of the detention of the water by the upper proprietor must depend on the circumstances of each case, and is to be judged by the jury. The law requires of the party that he should use the stream in a reasonable manner; and one of the conditions of the use is that he do not destroy, or render useless, or materially lessen or affect, the application of the water by those situated above or below him on the stream.¹

§ 390. Right of proprietor to have water unpolluted.—The owner of land through which a stream runs is entitled to the use of the water in its natural state; and any one who pollutes it so as to render it unfit for such use is liable in an action for damages, unless he has acquired, by grant or prescription, an adverse right against the owner of the land. And where a stream is polluted by one who has not acquired a right to do so, an action will lie against him by the owner of the land through which the stream flows, although he may not be able to show any actual damage by injury to his live-stock or to persons on his farm. His right is to the water, pure and clear, and any interference with that right is actionable.

The manner in which streams are most commonly polluted is by the operating of mills or manufactories upon the banks, and making use of the passing waters so as to taint them, or allowing deleterious or discoloring matter to pass from their works into the stream.

The right to do so may be acquired by direct purchase of

¹ The interest of riparian proprietors in a stream is not a title to the water, but merely a right to use it while passing over the land. No one can divert or detain it unreasonably, to the injury of the usufructuary rights of others below him, in the nature of a nuisance, which may be abated, or for which an action on the case will lie.

Agawam C. Co. v. Edwards, 36 Conn. 476, 497. "A proprietor cannot, for the purpose of irrigating his own land, wholly abstract or divert the water-course, or take such unreasonable quantity of water as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." (*Elliott v. F. R. R. Co.* 10 Cush. 191; *Arnold v. Foot*, 12 Wend. 330.) "The defendant had a right to use so much of the water as was necessary for his family and his cattle, but had no right to use it for irrigating his meadow, if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel."

the privilege from the parties who, being on the stream lower down, are affected, or by adverse possession and user by the person who commits or suffers the act complained of for a period equivalent to that prescribed in the Statute of Limitations applicable to title to lands by prescription.

In the measure of damages may be considered such as naturally or necessarily result from the pollution of the waters—the diminution of rental or sale value of land, the inconvenience suffered, loss of animals, or such other loss, inconvenience, or injury as may have resulted directly from the act complained of.

With the right to recover for damages suffered by the unlawful pollution of the waters of a stream is coupled the further relief of an action to abate the nuisance; and the two actions, being for the same act, may be joined, as a general rule.¹

§ 391. Accretion, or land created by alluvion, through the action of the water of a stream leaving deposits and creating soil along the shore, belongs to the riparian proprietors on the bank of the stream, so that those who own land fronting on a river are entitled to the land added thereto by accretion, their respective rights to be ascertained by extending the original river frontage of the respective parcels belonging to the several

¹ *Murgatroyd v. Robinson*, 7 Ellis & Black. 391; *Dickenson v. Grand Junction Canal Co.* 7 Exch. 282; *Wood v. Wand*, 3 Ibid. 748; *Embrey v. Owen*, 6 Exch. 353; *Gardner v. Trustees Etc.* 2 Johns. Ch. 162; *Gladfelter v. Walker*, Court of Appeals of Maryland, July, 1875—to appear in 40 Md. This was an action upon a complaint by a farmer, through whose land a stream ran, against the owners of a paper mill for pollution of the stream. The substance of the case appears from the opinion, which was that “the owner of land through which a stream flows is entitled to the use of the water in its natural state; and any one who pollutes it, so as to render it unfit for such use, is liable in an action for damages, unless he has acquired, by grant or prescription, an adverse right against the owner of the land. And where a stream is polluted by one who has not acquired a right so to do, by long enjoyment or grant, an action will lie against him by the owner of the land through which the stream flows, although he may not have suffered any actual damage. Where the owner of a farm through which a stream flows brings an action for damages for polluting the stream, he is entitled to recover such damages as naturally or necessarily resulted from the wrongful acts of the defendant; the loss of an opportunity by the plaintiff to rent his grist-mill, the diminution of the rental value of his farm, and the inconvenience he may have been put to in the use of the same, resulting directly from the conduct of the defendant, are proper elements for the consideration of the jury in estimating the damages.”

proprietors, as nearly as practicable at right angles with the course of the river to the thread, or middle line of the stream, as it exists after the accretion is formed.¹

Alluvion is the addition to riparian lands, gradually and imperceptibly made by the water; it differs from *reliction*, the increase of land by the sudden retreat of the sea or a river, in that the land, in the latter case, generally belongs to the State,² and is the direct opposite to *avulsion*, where, by the immediate and manifest power of a stream, the soil is taken suddenly from one man's estate and carried to another's, and where the title remains in him from whose land it was detached. The test as to what is gradual and imperceptible, under the rule of definition given, is that, though the persons who notice the change may see, from time to time, that progress is being made by the increase of soil, they could not perceive it while the process was going on. It makes no difference what may be the producing cause of the deposit or increase, whether natural or artificial—the result as to ownership remains the same: the increase of land belongs to him who owns that land to which it becomes attached. The riparian right to this increase is an essential and inherent attribute of the original ownership; it rests in the law of nature, and is of like character as that of the owner of a tree to the fruit it bears, and of the owner of animals to their natural growth and increase. The owner is subjected to the risk of loss by imperceptible wearing away of his property, and the chances of gain to him by the same cause operating upon property of others. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do and those that do not overflow their banks, and where

¹ *Miller v. Hepburn*, 8 Bush, Ky. 326; 3 Kent's Com. 428. "Land formed by alluvion, on the bank of a river not navigable, by the gradual wearing away of the opposite bank, is to be divided, ordinarily, according to this rule: Ascertain the length of the old shore-line, and of the part of it belonging to each proprietor; Then measure off for each proprietor a part of the new shore-line, in proportion to what he held in the old shore-line; and then draw lines from the boundaries at the ancient bank to the points of division on the new shore as thus ascertained. In this way, if such land is formed in the bend of the river, and the new shore-line is just one-half the length of the old one, each proprietor will take of the new shore-line just one-half the extent of his former shore-line." (*Batchelder v. Keniston*, 51 N. H. 496.)

² *Schultz on Aq. Rights*, 115, 138; *Angell on Tide Waters*, 75; *Bract.* 221; 2 Bl. Com. 262.

dykes and other defenses are, and where they are not, used to restrain the water.¹

§ 392. Islands situated in a river are, as to title, subject to the same general rule—that is to say, they belong to the person who owns the land on that bank of the stream to which the islands lie nearest; and where the two channels caused by the division of the stream by the island are both considerable, as compared to the entire volume of water, so that the island is in the middle of the river, the dividing line should be run through the middle of the island, and each proprietor would own half. In case the island is formed by accretion, and is in the middle of the stream, the division line should be according to the original dividing line, or *flum aquæ*, the center of the stream, continued on from the place where the waters begin to divide.²

§ 393. Ownership of water-power of a stream.—The water-power of a stream for milling purposes is a species of property to which the riparian proprietor may justly lay claim.

¹ "Alluvium is an addition to land, gradually and imperceptibly made by water to which the land is contiguous. The test as to what is gradual and imperceptible, in the sense of the rule, is that, though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the progress was going on." (*County v. W. Ferry Co.* U. S. Sup. Ct. Feb. 1875.)

"Whether it is the effect of natural or artificial causes, makes no difference, the result as to ownership in either case is the same. The riparian right to future alluvium is a vested right; it is an essential and inherent attribute of the original property." (*Ibid.*)

² 3 Kent's Com 428. "The whole of the old and the whole of the new line are to be taken into consideration, so that each may have his due proportion of the water-front." (*O'Donnell v. Kelsey*, 4 Sandf. 202; *Granger v. Swart*, 1 Woolw. 88; *Schools v. Risley*, 10 Wall. 91.)

These general rules apply where accretions occur slowly, from year to year; but if the alteration be sudden, it is not deemed within the strict rule of accretions.

Chancellor Kent states the proposition thus: "If a fresh-water river, running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad flum medium aquæ*; but if the alteration be sensibly and suddenly made, the ownership remains according to the original bounds; and if the river should then forsake its channel, and make an entirely new one in the lands of the owner on one side, he will become owner of the whole river, so far as it is inclosed by his land." (3 Kent's Com. 428; *Chapman v. Hoskins*, 2 Md. Ch. 485.)

Ang. on Water-Courses, Sec. 53; 2 Bl. Com. 519. "The title of a riparian proprietor is extended by alluvium or dereliction only where the accretion of dry land is by imperceptible degrees." (*Halsey v. McCormick*, 18 N. Y. 147.)

This water-power to which a riparian owner is entitled consists of the fall in the stream when in its natural state as it passes through his land, or along the boundaries of it. Or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it, and hence the rule must be, that a man has a right to dam back the water to his upper line, as the water was, and as the bottom of the creek was, in a state of nature when he built his dam.¹

§ 394. Mill privilege.—The use of this power of a stream, or, as it is technically termed, “mill privilege,” is, as a rule, exclusive and adverse to all the world; and hence one of the most common instances of acquiring a right by adverse enjoyment is that of obstructing the waters of a stream, and often of thereby setting back water upon the land of another, by means of a dam erected upon the owner’s land for the purpose of raising a head of water for the operation of mills or hydraulic works. If this is continued uninterruptedly and adversely for the term of twenty years, or such other period of time as prescribed by the Statute of Limitations of actions concerning possession of real property, the mill-owner acquires thereby an easement, or right to obstruct² such stream to the extent to which it shall

¹ *McCalmot v. Whitaker*, 3 Rawle, 84, 90; *Plumleigh v. Dawson*, 1 Gilm. 544. “The general doctrine relating to water-courses is, that every proprietor is entitled to the flow of the water in its natural course, and to the momentum of its fall on his own land.” (*Van Hoesen v. Coventry*, 10 Barb. 518, 520; *Davis v. Fuller*, 12 Vt. 178.)

But the reasonableness of the detention of the water by a mill-owner depends on the size and nature of the stream, and the exigencies of the business to which it is subservient. (*Pool v. Lewis*, 41 Ga. 162; *Webster v. Holland*, 58 Me. 168; *Daniels v. Chaffin*, 28 Iowa, 327.)

² *Powers v. Osgood*, 102 Mass. 454; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Washburn on Easements*, 243; *Seeley v. Brush*, 35 Conn. 419; *Heiskell v. Gross*, 7 Phil. (Pa.) 317. “Any incorporeal rights which may be lawfully granted, as the right to divert water from, or to flow it upon, the land of another, may be acquired by prescription.” (*Phinizy v. Augusta*, 47 Ga. 260.)

“A complaint, setting forth that the defendant had, for upwards of five years, been diverting and using water belonging to the plaintiff, but not that such use was under claim or color of right. Held, on demurrer, not to allege a prescriptive right in the defendant.” (*Winter v. Winter*, 8 Nev. 129.)

“To acquire the right to overflow the land of another, there must have been an uninterrupted enjoyment, under color of right, for a period of five years. There must have been an actual occupation by the flow of water, to the knowl-

have ~~been~~ enjoyed. But no priority of occupation, or use of water by a ~~mill~~-owner upon a stream within the limits of his own estate, affect the right of a riparian proprietor above to erect and operate a ~~mill~~, in a suitable and reasonable manner, upon his own land.¹

CHAPTER XXXV.

ROADS AND HIGHWAYS.

- § 395. Public roads—Rights of public and of land-owner.
- § 396. Title to land in roadway.
- § 397. Estate retained in roadway by owner of land.
- § 398. Rights of public in a highway.
- § 399. Right of public to soil and timber in highway.
- § 400. The public has no right of pasturage in highway.
- § 401. Rights of drovers upon public roads.
- § 402. Public right of way, how obtained.
- § 403. Eminent domain.
- § 404. Dedication of private property to public use.
- § 405. Private roads.
- § 406. Legislation as to private roads.

§ 395. Public roads—Rights of public and of land-owner.—Every thoroughfare, common to the public, is a highway, whether it be a carriage-way, a horse-way, a foot-way, or a navigable stream. The law is the same, with regard to a public way, as to fresh-water rivers, so far as relates to the right of soil, and it is always to be presumed that he who owns land adjoining such a way, or thoroughfare, owns the land in front of his premises to the center of the same, and has the right to the soil, exclusive of all the world, save so far as it is subject to the right of passage in the public.¹

This is a principle of the common law, and equally the rule in every State, unless specially controlled by statute; and, therefore, when the owner of land, bounding upon a highway, conveys to another such land, bounding it upon the road, in terms or by implication, it will always be presumed that he intended, and the law will give to his deed such effect as, to convey to the grantee the fee of the land to the center of the road, incumbered only with the public easement or right of way over it.²

¹ 3 Kent's Com. 432; *The Queen v. Saintliff*, 6 Mod. 255; *Rangeley v. Midland R. Co.* L. R. 3, Chan. Ap. 306, 310, 311; 1 Rol. Abr. B. Pl. 5; *Harg. Law Tracts*, 5; *Stevens v. Whistler*, 11 East, 51.

² "A highway is said not to be an easement, but a dedication to the public of

But this presumption may be overcome by express words of reservation in the grant, and it is competent for the owner of a farm, or any other land bounding upon a public highway, to describe and in his deed bound it on the side or edge of the highway, so as to rebut this presumption of law, and so retain his title to the land lying within the road.¹

§ 396. The title to the land over which the road runs generally remains in the original owner, subject to the public easement.

He may convey the soil under the highway without selling the land which adjoins the same, or the adjoining lands without the fee to the land covered by the road; these estates being severable he can part with one and retain the other, or sell them each to different persons; but if they are to be so severed it must be by express terms, and such as distinctly meet and rebut the legal presumption that a grant of land bounded upon a highway carries the fee in the half of the same opposite the land.²

§ 397. Estate retained by owner of land in public road.—The value of this estate in the half of the road-bed consists in the rights which the owner retains therein; notwithstanding its devotion to the public use, the owner of the fee retains his exclusive right to all the mines, springs of water, earth,

the occupation of the surface of the land for the purpose of passing and repassing, the public generally assuming the obligation of repairing it." (3 Kent's Com. 432, Note 1; *Cuming v. Prang*, 24 Mich. 523.)

¹ 3 Kent's Com. 434. "But it is competent for the owner of a farm or lot, having one or more of its sides on a public highway, to bound it by express terms on the side or edge of the highway, so as to rebut the presumption of law, and thereby reserve to himself his latent fee in the highway." (*Sibley v. Holden*, 10 Pick. 249.)

"Whether a grant of lands, bounded on a street, highway, or running stream, extends to the center of such street, highway, or stream, or is limited to the exterior line or margin thereof, depends upon the intent of the parties to the grant, as manifest by its terms; and while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, no particular word or form of expression is necessary to overcome such presumption." (A. L. J. Feb. 26th, 1876, p. 145; *White's Bank v. Nichols*, N. Y. Court of Appeals, Feb. 1st, 1876.)

² 3 Kent's Com. 434; 1 Roll. Abr. 392, pl. 5; *Headlum v. Headley*, Holt, N. P. 463; *Wright v. Howard*, 1 Sim. & Stu. 190; *Brown v. Kennedy*, 5 Harr. & J. 195; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Cole v. Drew*, 44 Vt. 40.

timber, and quarries which are within his half of the road, for every purpose not incompatible with the public right of way. He may maintain trespass, or ejectment, or waste, in respect to the same; and should the road be abandoned, or the public easement be lost, the entire and exclusive property and right of enjoyment revert in the proprietor of the soil.¹

§ 398. The rights of the public in a highway are to appropriate it to the public use in passing over it in the usual course of travel, with the powers and privileges incident to that right, such as digging the soil, using the timber and other materials for making or repairing the road which are found within the limits of the way; it is true that many of the uses to which this material may by the public be applied are inconsistent with the exclusive ownership thereof by the owner of the fee, but it must be remembered that the legal title by which the fee is retained is subject to the public easement; so also the right to use the soil, timber, and stone is controlled by the superior claim of the public in this right to use the same, which goes with the easement, upon the general principle that the grantor of any estate in lands is presumed to convey the right to use such property of the grantor as is requisite to the enjoyment of the property granted.²

§ 399. Right of public to soil and timber in roadway.—The public acquires only an easement in such soil, timber, or other material as may be found within the highway, and is requisite for building and repairing the road; it does not become the owner of it, can devote it to no other use, and will not be permitted to transport it to other roads, or apply it to

¹ 3 Kent's Com. 432; *Fairfield v. Williams*, 4 Mass. 427; *Perley v. Chandler*, 6 Ibid. 454; *Stackpole v. Healy*, 16 Ibid. 33; *Overman v. May*, 35 Iowa, 89. "Where a highway or street in a municipal corporation has been acquired by prescription, the fee remaining in the land-owner, he has a right to all things connected therewith, such as trees upon or mines and quarries under the land over which the highway passes, subject only to the right of passage by the public, and the incidental right of repairing and keeping it in proper repair." (*Dubuque v. Maloney*, 9 Iowa, 450; *Dubuque v. Benton*, 23 Ibid. 248; *Perley v. Chandler*, 6 Mass. 454; *Jackson v. Hathaway*, 15 Johns. 447; Wash. on Ease. 514.)

² Wash. Ease. 159; 3 Kent's Com. 434; *Hatch v. Dwight*, 17 Mass. 229; *Jackson v. Hathaway*, 15 Johns. 447; *Webber v. Eastern R. R. Co.* 2 Met. 151; *Child v. Starr*, 4 Hill, 369; *Dunlap v. Stetson*, 4 Mason, 349.

other public uses, or needlessly to interfere with it in such manner as to injuriously affect the rights in it of the owner of the soil.¹

§ 400. The public has no right of pasturage upon the highway.—The ownership of the soil is not in the public, and the easement cannot be extended beyond its legitimate specific uses. Neither a town, nor the State, has power to give a right to individuals to use the land appropriated as a highway otherwise than as such thoroughfare for travel, and all except this right of use by the public remains in the owner of the soil, and cannot be taken from him for private use without his consent, or due process of law. Depasturing of land is no part of its use, in any sense, as a highway. The owner of the land through which the public road runs is the owner of the soil, mines, quarries, and timber, so far restricted in the enjoyment of the use of the same only as the legitimate requisites of the public in the thoroughfare, and the building or repairing of the same, may require. Grass is in no sense a necessity to the public, and there is nothing in the character of a public way which makes it a common, or gives to the public a right of pasture thereon.²

¹ In *Cumming v. Pranz*, 24 Mich. 514, an action was brought by the owner of the fee in an alley, against a contractor, working under the direction of the city authorities, for taking certain gravel from under the roadway of the alley to grade other public ways in the city; it was held that, in the absence of any proof to the contrary, it is to be presumed that the owner of the adjoining lot owned the soil to the center of the alley, subject only to the public right in the same as a highway; that the public might use the gravel to grade this alley in front of the lot, or the whole of the alley on which the lot for ingress or egress was dependent, but not to repair other streets.

But in *Bissell v. Collins*, 28 Mich. 278, this rule is held to be qualified as to streets in a city, on the ground that they are each with the other so joined as to make a complete road from all parts of the city, each with the other, and that, therefore, there may be an exception in favor of city streets, and take those out of the general rule which controls suburban highways.

In *Overman v. May*, 35 Iowa, 89, it was held that although the public might quarry stone under a road or highway to repair the same, it could not so quarry stone there to repair another one.

Wash on Ease. 214; *Lade v. Shepherd*, 2 Strange, 1004.

² A strong case to this point is *Cole v. Drew*, 44 Vt. 49. Defendant's children, in going over the public road to school, were discommoded by the high grass getting their clothing wet. She applied to the district road surveyor, or overseer, for permission to cut the grass, which he accorded, and she cut the grass and fed it to her horse; plaintiff, a proprietor adjoining the road, brought suit for the value of the grass cut, and recovered. The Supreme Court, on appeal,

But from this it does not result that where fence laws exist, which control the common-law rule, that the owner of cattle must fence them in. No fences are requisite by the owner of agricultural lands bounded on a public highway, though it would appear to be so where the common-law rule as to fences prevails.

§ 401. The rights of drovers upon public highways.—The public have a free right of way and travel over the highway for all legitimate purposes of travel, freight, and commerce, and hence droves of cattle, or other live-stock, may be driven along the road, and being properly in the highway, if they stray upon cultivated land through which the road runs, because of a lack of sufficient fences to restrain them, where the common-law rule is abrogated, the loss caused by damage done by them must fall on him whose duty it was to fence his land from the public road.¹

§ 402. Public right of way, how obtained.—The title to the public easement in roads is acquired by direct grant, prescription, the power to take private property for public use, commonly known as eminent domain, and dedication.

Right of way over lands to the public may be granted by the owner of the soil by deed, or it may be presumed from such continuous user of the way as establishes the presumption of a

affirmed the judgment, and held that: "The owner of the soil, over which a highway is located, is entitled to the emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and materials thereon for the purpose of building and maintaining a highway, suitable for the safe passage of travelers." (*Goodtitle v. Alker*, 1 Burr, 133; *Holder v. Shattuck*, 34 Vt. 336; *Six Carpenters' Case*, 8 Coke, 146; *Fullam v. Stearns*, 30 Vt. 443.)

¹ "At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription; but he was at his peril to keep his cattle on his own close, and to prevent them from escaping; and if they escaped, they might be taken on whatever land they might be found doing damage, or the owner was liable to an action of trespass by the party injured. And this rule of the common law applied as well to division fences as to those upon the public highway." (*Rust v. Low*, 6 Mass. 94; *Holladay v. Marsh*, 3 Wend. 142; *Indianapolis R. R. Co. v. Harter*, 38 Ind. 557.)

But this provision of the common law has, in many of the United States, been rendered inapplicable, and held to be incompatible with the habits and necessities of the people. (*McBride v. Lynde*, 65 Ill. 411; *Frazier v. Nortinus*, 34 Iowa, 82; *Keenan v. Cavanaugh*, 44 Vt. 286.)

grant having been made, and which is called prescription, the original theory of which was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long period of time, in England, went back to the time of Richard I; but the inconvenience of showing so long an enjoyment of the use has modified the rule, and reduced the period to that prescribed by the Statute of Limitations for the commencement of actions for the recovery of real property.¹ But it must appear that the user has been continuous, and of such a character as to repel the presumption that the way has been used as a temporary convenience by the license of the owner of the soil, with a right by him reserved to revoke the permission to use it by the public.²

§ 403. Eminent domain, the power to take private property for public use, is well settled to exist only in cases where the public exigency demands its exercise; but in determining whether the use is public, it has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. It is enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of the State, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor. Such results indirectly contribute to the general welfare and property of the whole community.³

¹ *Livermore v. City*, Etc. 35 Iowa, 558; *Overman v. May*, Ibid, 89. "Where the use of a strip of land for a highway is supposed to conform to the highway as laid out, but, in fact, differs from it, the public do not acquire the right to the strip actually used in virtue of an adverse possession, because the possession does not correspond with the claim of right, nor in virtue of dedication, because there never was an intent by the owners to dedicate the strip used." (*State v. Welpton*, 34 Iowa, 144; *Scribner v. Blate*, 28 Wis. 148.)

² "If the right to a road be acquired by adverse user for twenty years, its non-user for a like space of time, with the knowledge and acquiescence of the owner of the inheritance, will extinguish the right so acquired, because such ceasing to use the road affords legitimate presumption of a release of the right." (*Browne v. Trustees*, Etc. 37 Md. 108.)

³ "To authorize the taking of private property, under statutes of eminent domain, two things are necessary: 1st. The property must be taken for public use; and 2d. Provision must be made, except in urgent and extraordinary

It should, however, be understood that private property can only be so taken for public use upon due compensation being made to the owner, and the compensation must be real and substantial; it is not enough that a bond be given to insure the payment of the value of the property taken.¹

As a general rule, in the matter of laying out roads, and in all others of a similar character, statutes prescribing the mode by which a party may be divested of his property for public use, without his consent, must be strictly construed, and the public, as against the individual deprived of his land, must be prepared to prove that the mode prescribed has been strictly followed.²

§ 404. Dedication of private property to public use.—

To dedicate property to public use is simply to appropriate or set it apart to such use; there must be not only an intention to dedicate, but an act manifesting this purpose. Hence, an expression of the intention, without some act to effectuate it, does not make a valid dedication.

No particular form or solemnity is requisite to constitute a valid dedication. A writing signed and acknowledged is not necessary. A dedication may be by parol, and may be established by proof of the verbal declarations of the owner of the land; or it may be presumed without proof of any act of dedication from the acquiescence of the owner in the use and occu-

cases, for just compensation to the owner of the property taken." (Loughbridge v. Harris, 42 Ga. 500; Hannibal Bridge Co. v. Shaubacker, 49 Mo. 555; Hopkins v. Mason, 42 How. Pr. 115; County Commissioners v. Humphrey, 47 Ga. 565.)

¹ San Mateo W. Co. v. Sharpstein, 50 Cal. 284; Cooley Const. Lim. 562; Pacific Law Rep. Feb. 15, 1876; Sanborn v. Belden, Sup. Ct. Cal. Feb. 1876.

"We are satisfied that wise policy and sound constitutional principles require us to hold that a bond executed by sureties, who may be supposed to be, or who, in fact, may be responsible, when the preliminary order is made, does not constitute a certain and adequate compensation." (Sanborn v. Belden.)

"If it be competent for the legislature to declare that a mere bond shall constitute compensation upon a taking at the commencement of the condemnation proceedings, it might also declare that such bonds should constitute compensation upon the final taking, which would operate a plain violation of the provisions of the constitution restraining the exercise of eminent domain." (Ibid.)

² Commissioners of Washington Park, Etc. 52 N. Y. 131. "A State legislature may prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use; but the prescribed procedure must not destroy or substantially impair the right itself." (Potter v. Ames, 43 Cal. 75.)

pation of property by the public. But generally such use must be adverse to the owner of the title to raise a presumption of dedication.¹

It is essential that the dedication should be by the owner of the fee, inasmuch as the dedication, to be valid, must be a devotion of the land to the public use for all time, and no title less than the fee-simple could control such a use.²

§ 405. Private roads.—The system prevalent, in some of the States, of invoking the law of eminent domain in behalf of individuals, by giving to the appropriate officers of the several counties the power to create and open private as well as public roads, is open to serious question on the ground of unconstitutionality. The general tenor of statutes which provide for the opening of private roads is such as to lead the mind, in considering them, to an appreciation of the fact that an attempt is being

¹ 3 Kent's Com. 450; *Arrowsmith v. New Orleans*, 24 La. An. 194; *Columbus v. Dahn*, 36 Ind. 330; *Robertson v. Wellsville*, 1 Bond, 81; *Boers v. Strader*, 1 Cinc. (Ohio) 57; *Fisher v. Beard*, 32 Iowa, 346. A highway cannot be established by prescription, where the consent of the owner of the land appears. (*Payard v. Hargrove*, 45 Ga. 342; *Evansville v. Evans*, 37 Ind. 229; *Yost v. Leonard*, 34 Iowa, 9; *McDunn v. Des Moines*, *Ibid*, 467; *Briel v. Natchez*, 48 Miss. 423; *Wiggins v. McCleary*, 49 N. Y. 346; *Trustees v. Walsh*, 57 Ill. 363.)

² *San Francisco v. Canavan*, 42 Cal. 541. "A dedication to public uses by a release without covenants by a person who is a mere occupant of public land, having no other estate or interest therein than the bare possession, does not bind an after-acquired estate in the same premises." (Deady, 1.)

Williams v. New York, Etc. 39 Conn. 509. "To constitute a dedication of land for a public highway, there must be an intention on the part of the owner so to dedicate it, and an acceptance of it for such use by the public." (*Havana v. Biggs*, 58 Ill. 483; *Tyler v. Sturdy*, 108 Mass. 196; *Peoria v. Johnston*, 56 Ill. 45; *Houghton v. Harvey*, 33 Iowa, 203.)

"Where a road had been traveled for over thirty years, and was not a mere neighborhood track through uninclosed woodland, but a well defined, traveled road between important points in the neighborhood, and the travel varied not more than usual from the main beaten track, and the public authorities, with the knowledge of the former owners of the land over which it passed, made repairs, and built bridges where needed, held, that the long user by the public, and the acts of acceptance by the authorities in making repairs and building bridges where needed along the line of the road, and the acquiescence of the grantors of the owner contesting the road, fully justified the jury in inferring a dedication and the existence of a highway." (*Hiner v. Jeanport*, 65 Ill. 428.)

"A highway may be lawfully established by public user and recognition by the public authorities, and acquiescence of the owners of the land over which it passes. No express words of dedication are necessary, and consent may be inferred from acquiescence and user by the public, and user does not depend upon any fixed period of time." (*Hiner v. Jeanport*, 65 Ill. 428.)

made to reach and remedy a class of evils of a *quasi*-public character.

The community appears to be interested in the development of each farm to its fullest capacity of production, that it may add to the commonwealth; and the creation of small farm-homesteads is one of the most efficient means to this development. Hence, it naturally results that such encouragement as may properly be given to the cutting up of large into small parcels of land may, and often does, give rise to such a condition of things as that citizens, in their homes, may have no means of reaching the highways without there being any pressing public necessity for a public road to or by their farms.

In such cases, it is not easy to say what the remedy is to the patent evil; the general public good may not be sufficient to procure the opening, to such farms, of public roads, and the constitutionality of the laws which permit the opening of private roads is more than questionable. The right of eminent domain is the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes; but it is only to be exercised when the public exigencies demand it, and it cannot properly be claimed that the exigency which demands the opening of a *private* road can be a *public* one.¹

§ 406. Legislation as to private roads.—It is conceded, by all the later authorities, that the legislature has no power, in any case, to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit. It seems not to be allowable, therefore, to authorize private roads to be laid out across the

¹ *Bankhead v. Brown*, 25 Iowa, 540; *Cooley*, Const. Lim. 530; *Waterworks Etc. v. Burkhardt*, 41 Ind. 364; *Angell on Highways*, 1, 2; *Sadler v. Langham*, 34 Ala. 311.

Nesbitt v. Trumbo, 39 Ill. 110, held that an act authorizing the establishment of private roads, so far as it undertook to appropriate private property, was unconstitutional; that the legislature was powerless to afford the means by which a private way could be established over another's land without his consent. (*Dickey v. Tension*, 27 Mo. 373; *Osborn v. Hart*, 24 Wis. 89; *Taylor v. Porter*, 4 Hill, 140.)

"The statute authorizing the location of private roads, as far as it provides for the exercise of the right of eminent domain to establish them, is unconstitutional." (*Wild v. Delg*, 43 Ind. 455.)

lands of unwilling parties by an exercise of this right. The easement, in such a case, would be the property of him for whom it was established.¹

Even if it be conceded that the public exigency requires that a way should be opened to every man's farm, and that the State may and should provide for the establishment of a public road or highway, to enable every citizen to discharge his duties and travel to and from his farm, it does not follow that such ways should be private, and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of the highway, by the public, that distinguishes it from a private way or road—it is the *right* to so use or travel upon it, not its exercise.

¹ "The law for the establishment of private ways, for the benefit of one man over the lands of another, is unconstitutional." (*Stewart v. Hartman*, 46 Ind. 331; *Clark v. White*, 2 Swann, Tenn. 540; *Hickman's Case*, 4 Harring. 580; *Perrine v. Farr*, 2 Zab. 386.)

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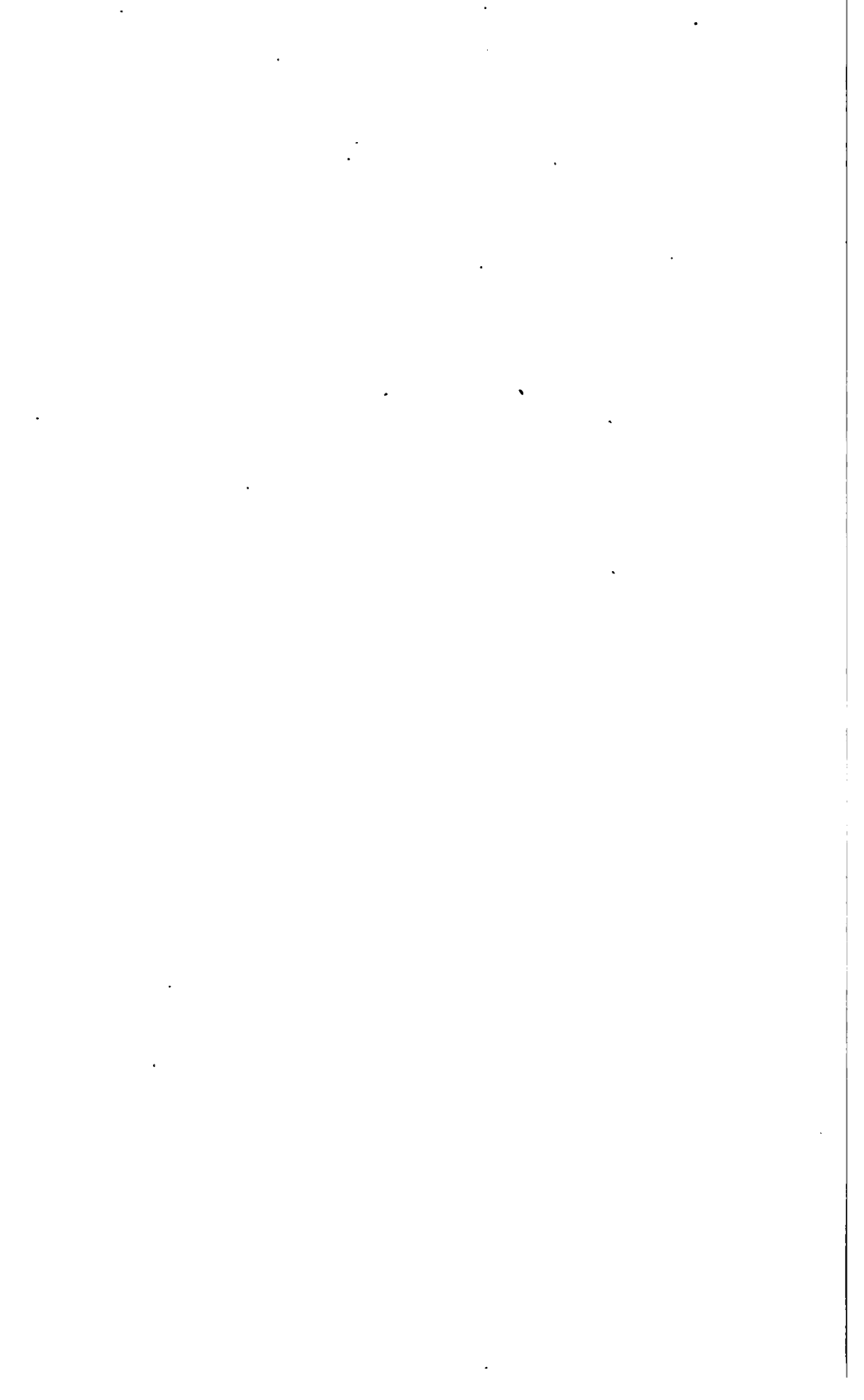
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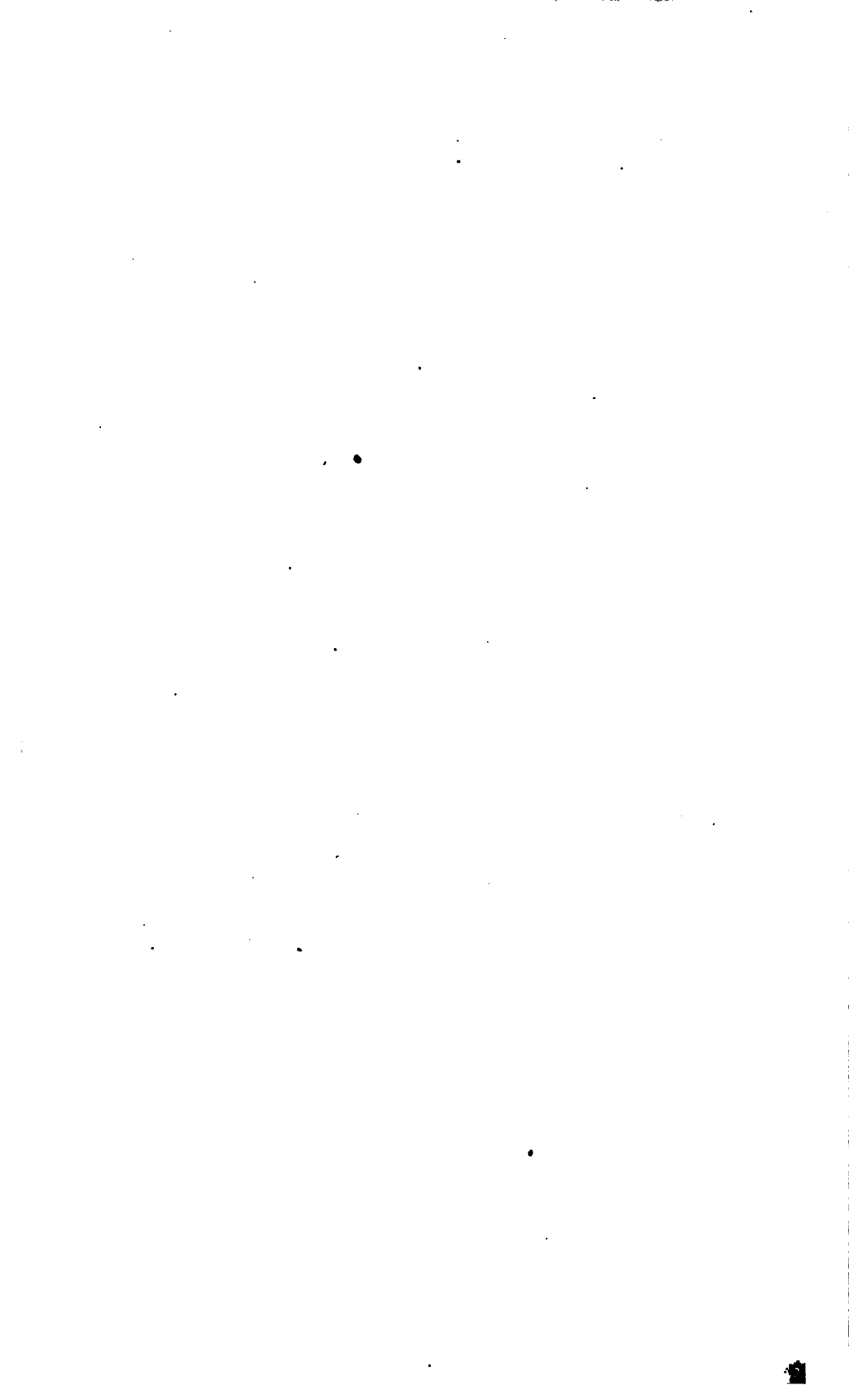
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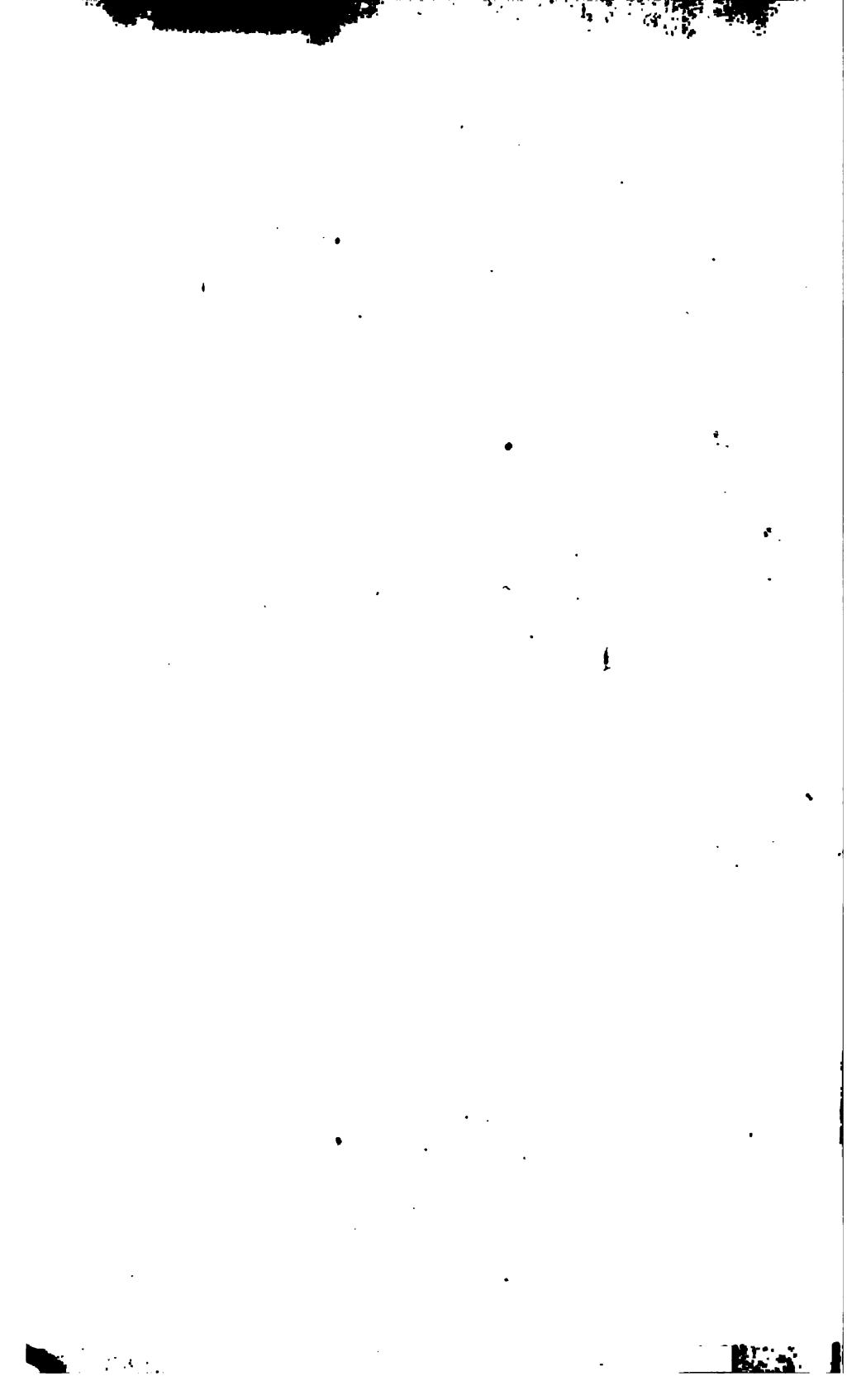
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